

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

**MERCEDES-BENZ U.S. INTERNATIONAL,
INC. (MBUSI)**

and

Case 10-CA-226249

KIRK GARNER, An Individual

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

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I. INTRODUCTION AND STATEMENT OF THE CASE

This brief is submitted in support of Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision in the instant case (JDD-61-19, issued July 26, 2019) (ALJD).

The instant case involves a threat by Respondent Mercedes-Benz U.S. International, Inc. (MBUSI) (Respondent), to Charging Party Kirk Garner (Garner) on August 10, 2018, and Respondent's August 13, 2018, group interrogation of employees regarding their protected concerted activities. For the reasons that follow, the record evidence compels the conclusion that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint. Accordingly, the Board should find that the judge erred in his decision to the contrary, enter an order finding Respondent to be in violation of the Act, order Respondent to cease and desist its unlawful conduct, and order Respondent to remedy its unlawful conduct.

A. Respondent's Business Operations

Respondent is a large, multi-national corporation engaged in automobile manufacture for domestic and international sale. Respondent maintains a facility in Vance, Alabama, where it manufactures several models of Mercedes-Benz automobiles using an assembly line process. (Tr. 49:6 – 50:7)¹ At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (ALJD 10:11-12).

Charging Party Garner has worked for Respondent since 2000. He is employed in the Quality department, which performs quality inspection on vehicles manufactured at Respondent's facility. He is co-supervised by Group Leaders Don Fillmore and Tim Ivory. (Tr. 132:19 – 133:5)

¹ References to the one-volume transcript and/or the ALJD will appear as page number: line number.

Fillmore and Ivory are supervisors and agents of Respondent within the meaning of the Act. (Tr. 6:9-20)

B. Garner's Protected Concerted Activities

Around August 7, 2018,² during a shift start-up meeting, Fillmore informed Quality Department employees that contract workers were going to be brought into the department soon. (Tr. 26:3-8) Following this announcement, Garner spoke with his coworkers Kiley Medders, Thomas McCullough, and Bill Thomas about the incoming contract workers. (Tr. 134:12-15) Garner also went to Respondent's human resources department and informed a representative that he did not want to train contract workers. The representative informed Garner that he did not have to train if he did not want to train. (ALJD 2:33-35).

Around August 9, Garner discussed this matter with Group Leader Fillmore in a private, one-on-one discussion at Fillmore's desk. (Tr. 27:9-20) Garner initially told Fillmore that he did not want to train contract employees and did not want them in the Quality department, and he added that no one in the Quality group wanted contractors there or wanted to train them. (Tr. 30:10-17; ALJD 3:2-4) Garner was the only employee who informed Respondent, prior to August 13, that he and others did not want to train contractors. (Tr. 30:18-20; 124:22 – 128:10)

C. Respondent's Threat of Unspecified Reprisals

Fillmore believed Garner when he stated that no one wanted to train contract employees. (Tr. 84:18-24) However, in response to Garner, he stated that Garner could only speak for himself, not the rest of the group. (Tr. 31:2-4; ALJD 3:4-5)

On August 10, Fillmore had another private, one-on-one discussion about contractors with Garner in his work area outside the Team Center. During this conversation, Garner stated, "I just

² All further dates are 2018 unless otherwise stated.

want you to understand that we don't want to train them or want them in here," and, "I just want you to know before you bring them in here and you all will get embarrassed because no one wants to train them here and I don't want to train them." (Tr. 40:14-20)³ Fillmore admits that he responded, "I have a job to do, and since I'm not quite ready to retire, we all have a job to do. ... Kirk, please do not disrupt the group because that will not help or be good for anyone, we all have a job to do, and it's going to take everyone to do it." (Tr. 34:10-20, 41:1-7) In finding that this statement did not violate the National Labor Relations Act (the Act), the judge only considered a portion of Fillmore's statement. Specifically, the judge only considered "Kirk, please do not disrupt the group because that will not help or be good for anyone, we all have a job to do, and it's going to take everyone to do it," omitting Fillmore's comment that he was not ready to retire (ALJD 3:14-16; 3:30 - 4:7).

D. Respondent's Group Interrogation of Employees Regarding Protected Concerted Activities

Fillmore informed co-supervisor Ivory of his August 9 and 10 conversations with Garner. (Tr. 42:11-16; ALJD 3:18-19) Around August 13, Ivory led a meeting with Garner's work group. Ivory admitted that he told employees that Garner told Fillmore that no one wants to train contractors. (Tr. 110:25 – 111:5; ALJD 3:20-21) Garner interjected and said that he did not say that. (Tr. 136:3-4) Ivory then said that he wanted a show of hands of "whether or not that was

³ Counsel for the General Counsel anticipates that Respondent's counsel will take the same tack it did in its post-hearing brief to the judge and attempt to mislead the Board with an extraordinary claim that Garner threatened to engage in a partial strike and/or encourage in a partial strike and that he threatened to mistreat contract workers. (Respondent's Post-hearing Brief at 10-13, 20-23) These claims are in complete contradiction to the record, are entirely speculative, and are unsupported by any record evidence. Garner stated that he did not *want* to train, and that no one else *wanted* to train. (Tr. 40:14-20). Respondent's supervisor Fillmore admitted at hearing that Garner never indicated or threatened a refusal to perform these tasks if assigned and that Garner never stated that he was going to mistreat contract workers. (Tr. 104:19 – 105:13; 107:8-16).

true.” (ALJD 3:21). Employees Medders and Garner raised their hands. (ALJD 3:21-23) Garner testified that employee William “Bill” Thomas said that he was not going to say anything publicly, and employee Thomas McCullough interjected and said that Ivory should not solicit volunteers this way. After McCullough’s statement, Ivory replied “okay” and ended the meeting. (Tr. 137:18 – 138:25) Ivory did not provide any assurances to employees that they would not suffer adverse action if they raised their hands in response to his query to the group. (Tr. 108:12 – 131:19)

Thomas corroborated that he spoke with Garner about training contractors prior to the August 13 polling by Ivory. Thomas told Garner that he did not want to train. (Tr. 153:25 – 153:6) However, when Ivory asked employees to raise their hands if what Garner said was true, Thomas did not raise his hand. (See Tr. 111:11-17) Thomas also corroborated that, during the meeting, he stated that he was not going to respond to Ivory’s questioning.⁴ (Tr. 155:7-9)

Ivory admitted in his testimony that he told employees at the meeting that Garner said employees did not want to train contractors and asked employees to raise their hand if that was true. Ivory denied hearing Garner, McCullough, or Thomas say anything in the meeting, but he admitted that only Garner and Medders raised their hands to indicate, in response to Ivory’s group interrogation, that they did not want to train. (Tr. 111:11-17) Team Leader Liz Kelly and employee Michael Benson also denied hearing Garner, McCullough, or Thomas say anything in the meeting, and Kelly asserts that the statements did not occur. (Tr. 162:15-18; 166:20-22) Benson testified that he did not consider Ivory’s questioning to be threatening or intimidating (Tr. 166:8-11), but

⁴ Counsel for the General Counsel anticipates that here, Respondent’s counsel will again attempt to mislead the Board. In its post-hearing brief to the judge, Respondent’s counsel alleged that Thomas did not corroborate Garner’s claim. (Respondent’s Post-hearing Brief at 15) As demonstrated by the record, that claim is false. (Tr. 155:7-9). The additional testimony of Thomas, adduced by Respondent’s counsel on cross-examination, is that, in addition to his statement during the meeting, after the meeting Thomas told Garner that he thought Ivory’s handling of the meeting was wrong. (Tr. 156:15 – 157:5).

admitted that he had not engaged in any conversations with Garner regarding contractors. (Tr. 169:6-8) Team Leader Kelly admitted that she is not primarily responsible for training contractors or employees. (Tr. 164:7-9).

After the meeting, McCullough approached Ivory and said, “I don’t know what Kirk’s talking about. I don’t want no part of it.” (Tr. 112:9-24) As pointed out during Respondent’s cross-examination of Thomas, Garner and Thomas also talked after the meeting, at which point Thomas told Garner that he thought Ivory was wrong in the way he handled the situation. (Tr. 156:15 – 157:5)

In his decision finding that Respondent did not violate the Act through Ivory’s questioning of the group, the judge did not acknowledge or consider the testimony of Benson, Garner, Kelly, or Thomas, nor did he acknowledge or consider McCullough’s testimony about his statements to Ivory following the questioning. (ALJD 4:12 – 5:5)

E. The Administrative Law Judge’s Flawed Decision

In his decision, the judge erred by finding that Respondent did not violate Section 8(a)(1) of the National Labor Relations Act (“the Act”) by threatening Garner with unspecified reprisals for engaging in protected concerted activity, or by interrogating a group of employees regarding their protected concerted activities. In particular, the judge erred by overlooking significant portions of the record, and by misapplying Board precedent.

II. ISSUES PRESENTED

The issues presented here are whether the ALJ erred in his Decision by:

- A. Failing to consider the full statement made by Supervisor Fillmore to Charging Party Garner on August 10.

- B. Failing to find that Fillmore’s complete August 10 statement to Garner, “I have a job to do, and since I’m not quite ready to retire, we all have a job to do. Kirk, please do not disrupt the group because that will not help or be good for anyone, we all have a job to do, and it’s going to take everyone to do it,” included a threat of adverse consequences.
- C. Asserting that Garner refused to perform training.
- D. Finding that the cases cited by Counsel for the General Counsel “are easily distinguishable.”
- E. Finding that Fillmore’s statement to Garner that “I have a job to do, and since I’m not quite ready to retire, we all have a job to do. ...Kirk, please do not disrupt the group because that will not help of be good for anyone, we all have a job to do, and it’s going to take everyone to do it,” did not constitute a threat violating Section 8(a)(1) of the Act.
- F. Failing to acknowledge or consider the testimony of Kirk Garner, Timothy Ivory, and Williams Thomas in relation to the polling/interrogation allegation.
- G. Finding that Respondent’s polling/interrogation of employees regarding their protected concerted activities did not violate Section 8(a)(1) of the Act.
- H. Failing to make credibility determinations regarding the testimony of Michael Benson, Don Fillmore, Kirk Garner, Timothy Ivory, Liz Kelly, and Bill Thomas.

III. ARGUMENT

- A. The judge erred by failing to consider the complete statement Fillmore made to Garner on August 10 that “I have a job to do, and since I’m not quite ready to retire, we all have a job to do,” followed by, “Kirk, please do not disrupt the group because that will not help or be good for anyone, we all have a job to do, and it’s going to take everyone to do it.” (GC Exception 1)**
- B. The judge erred by finding that Fillmore’s August 10 statement to Garner did not include a threat of adverse consequences. (GC Exceptions 3, 4, 5)**

The judge in this case failed to consider the complete statement admitted to by Fillmore in the record, and in so doing, he failed to conclude that Fillmore's statement included a threat of adverse action.

Fillmore admitted that, in response to Garner's statements that the group did not want to train contractors, and that Respondent would be embarrassed because no one wants to train, Fillmore replied on August 10, "I have a job to do, *and since I'm not quite ready to retire*, we all have a job to do. ... Kirk, please do not disrupt the group because that will not help or be good for anyone, we all have a job to do, and it's going to take everyone to do it." (emphasis added)

The judge erroneously considered only a portion of Fillmore's statement and concluded, as a result, that Fillmore's statement, "that will not help or be good for anyone" could be reasonably interpreted to mean anything. However, the totality of Fillmore's statement makes clear that he was talking specifically about his and Garner's job security, first stating, "I have a job to do, and since I'm not quite ready to retire, we all have a job to do," and then repeating, "we all have a job to do." In his statement, Fillmore makes clear that he considered Garner's protected concerted activity with his fellow employees a possible "disruption," and he attempted to coerce Garner to cease in his protected activities by making it clear that his protected activities could adversely affect their job security with his statement, "...since I'm not quite ready to retire, we all have a job to do." The Board has long held that statements by a supervisor which tie their retirement to a non-supervisory employee's protected activity constitute a threat of adverse consequences violating of Section 8(a)(1) of the Act. See generally, e.g., *Somerset Short & Pajama Co.*, 238 NLRB 1160 (1978) (owner and manager who stated that he would retire if employees voted for a union found to be making a threat violating Section 8(a)(1) of the Act); *Packer Industries*, 228 NLRB No. 25, slip op. at 4 (1977) (company president who threatened to retire because of union organizational

activity found to be making a threat violating Section 8(a)(1) of the Act). Therefore, Fillmore's complete statement included a threat of adverse consequences, and the judge's finding that it did not was in error.

C. Kirk Garner never refused to train contractors. (GC Exception 2)

In its post-hearing brief to the judge, Respondent attempted to mislead the judge with an extraordinary claim that Garner threatened to engage in a partial strike and/or encourage in a partial strike. (Respondent's Post-hearing Brief at 20-23) The judge asserts in his decision that Garner refused to train, stating, "...Garner continued to refuse to perform this training." (ALJD 3:31-32) However, this is in complete contradiction of the record. Garner stated that he did not *want* to train, and that no one else *wanted* to train. (Tr. 40:14-20). Respondent's supervisor Fillmore admitted at hearing that Garner never indicated or threatened a refusal to perform these tasks if assigned. (Tr. 104:19 – 105:13; 107:8-16).

D. The judge erred in his conclusion that the cases cited by Counsel for the General Counsel "are easily distinguishable." (GC Exception 6)

In Counsel for the General Counsel's post-hearing brief, three cases were cited as illustrative that Fillmore's threat to Garner violates Section 8(a)(1) of the Act: *United Foods Management Services, Inc.*, 234 NLRB 744 (1978), *Boese Hilburn Electric Serv. Co.*, 313 NLRB 372 (1993), and *Astro Tool & Die Co.*, 320 NLRB 1157 (1996).

In footnote 5 of his decision, the judge erroneously stated that these cases are "easily distinguishable" as they each contained explicit threats.

In *United Foods Management Services, Inc.*, 234 NLRB 744, the Board considered a case in which a supervisor told an employee that two other employees were fired for "stirring up trouble" after those employees engaged in known protected concerted and union activities. The Board affirmed the Administrative Law Judge's findings that the statement was coercive in

violation of Section 8(a)(1) of the Act. The Administrative Law Judge found, and the Board affirmed, that the employer's bookkeeper was told, after two employees were fired, that those employees were "fired because they were stirring up trouble." There was no explicit threat to the bookkeeper's position, nor any allegation that the bookkeeper was known to have engaged in protected activities like the discharged employees. However, the statement was still found to be unlawful in violation of Section 8(a)(1) of the Act. Id. at 747.

In *Boese Hilburn Electric Serv. Co.*, 313 NLRB 372, the Board reviewed a case in which a former employee was told, at the conclusion of a discharge meeting, to not "go out there stirring up a bunch of shit." Id. at 377. The Board found that this statement would reasonably coerce the former employee from engaging in Section 7 activities and therefore found the statement to violate Section 8(a)(1) of the Act. Id. at 372-375. In *Hilburn*, an employee was told *after her discharge* to not "go out there stirring up a bunch of shit." The employer had already discharged the employee. She was no longer an employee at the time of the statement. However, the Board concluded that the statement still constituted a threat designed to coerce her from discussing her discharge, and the Board found that the statement violates Section 8(a)(1) of the Act.

In *Astro Tool & Die Co.*, 320 NLRB 1157, in response to an employee's complaints to her coworkers about working conditions, an employer representative told the employee, "It has come to our attention from multiple sources that you are doing a lot of complaining about Astro Tool & Die. We have employed you to do your job and not to complain to other coworkers about things that you dislike here. As we have told you before, your complaining should only be directed at management and not your coworkers. Maybe it would be better if you find other employment. This is your very last warning." The Board affirmed the Administrative Law

Judge's finding that this statement was coercive and a threat of discharge in violation of Section 8(a)(1) of the Act.

Each of these cases contain statements which are similar to the statement made by Fillmore: "I have a job to do, and since I'm not quite ready to retire, we all have a job to do. ... Kirk, please do not disrupt the group because that will not help or be good for anyone, we all have a job to do, and it's going to take everyone to do it." As in *United Foods*, *Hilburn*, and *Astro Tool*, Fillmore's statement does not contain an explicit threat, but it does implicitly threaten that the employee will experience adverse consequences if he engages in protected activities. Like the employer in *Astro Tool*, Respondent directly tied Garner's protected activities to his and others' employment by reminding Garner that he has a job to do and that, since Fillmore was "not ready to retire," it will "not be good for anyone" if Garner continues to engage in protected activities.

For these reasons, the judge erred in his conclusion that the cases cited in Counsel for the General Counsel's post-hearing brief are "easily distinguishable."

E. The judge erred in his conclusion that Fillmore's statement to Garner on August 10, 2018, did not constitute a threat in violation of Section 8(a)(1) of the Act. (GC Exception 7)

"An employer violates Section 8(a)(1) if its conduct 'would tend to coerce a reasonable employee'" in the exercise of his or her Section 7 rights. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003) (quoting *Madison Industries*, 290 NLRB 1226, 1229 (1988) and *Without Reservation*, 280 NLRB 1408, 1414 (1996)). If an employee would reasonably interpret a remark as a threat, then the remark violates Section 8(a)(1) regardless of the speaker's actual intent or the actual effect on the listener. *Concepts & Designs*, 318 NLRB at 954 (1995). The Board considers the "totality of the relevant circumstances" when determining whether an employer's statement

violates Section 8(a)(1). *Saginaw Control & Engineering, Inc.*, 339 NLRB at 541 (quoting *Ebenezer Rail Car Services*, 333 NLRB 167, n.2 (2001)).

As explained in the foregoing section, the Board's decisions in *United Foods*, *Hilburn*, and *Astro Tool*, and the unchallenged evidence in the record establish that Fillmore's statement to Garner on August 10 violated Section 8(a)(1) of the Act. Fillmore's statements were made in direct response to Garner communicating that his complaints reflected the complaints of his coworkers.⁵ In addition to having previously instructed Garner on August 9 that he could not speak on behalf of others, Fillmore directed Garner to "not disrupt the group," similar to the prohibition in *Boese Hilburn* against "stirring up shit." Furthermore, similar to the employer in *Astro Tool*, Fillmore tied this prohibition directly to Garner's job security, as he said when issuing the prohibition: "I have a job to do, and since I'm not quite ready to retire, we all have a job to do... please do not disrupt the group, because that will not help or be good for anyone." Fillmore's statement indicated that Garner's activities could negatively impact continued employment and

⁵ Garner's concerted complaints clearly constitute protected concerted activity. The standard for determining whether an employee has engaged in protected concerted activity is an objective one. See, e.g., *Circle K Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993). The question is whether the employer's conduct "relate(s) to collective bargaining, working conditions and hours, or other matters of 'mutual protection' of employees." *Id.*, quoting *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328, fn. 10 (7th Cir. 1976). It is immaterial whether the employee's concerns relating to his conduct have merit or whether other employees support or agree with the employee's concerns. See, e.g., *Vought Corp.*, 273 NLRB 1290, 1294, fn. 28 (1984); *Spinoza, Inc.*, 199 NLRB 525 (1972), enfd. 478 F. 2d 1407 (5th Cir. 1973); *Circle K. Corp.* 305 NLRB at 933. Employees who seek to improve or alter employees' work assignments are dealing with conditions of employment as defined by Section 7 of the Act. *Circus Circus Las Vegas*, 366 NLRB No. 110 (June 15, 2018), citing *Eastex v. NLRB*, 437 U.S. 556, 563-568 (1978). Therefore, Garner's complaints to Fillmore regarding employees in the Quality department being assigned to train contract workers involved conditions of employment and constituted protected concerted activity. See, e.g., *Circle K Corp.*, 305 NLRB 932, enfd. Mem. 989 F.2d 498; *Vought Corp.*, 273 NLRB at fn. 28; *Spinoza, Inc.*, 199 NLRB 525, enfd. 478 F. 2d 1407; *Circle K. Corp.* 305 NLRB at 933; see also *Circus Circus Las Vegas*, 366 NLRB No. 110, citing *Eastex*, 437 U.S. at 563-568.

that continuing his protected concerted activities “will not be good for anyone.” It is well settled that statements suggesting a negative impact on an employee’s continued employment if they continue to engage in protected concerted activities violate Section 8(a)(1) of the Act. *UPMC Presbyterian Hospital*, 366 NLRB No. 142 (August 6, 2018) (employer’s statement to employee that she “should be careful” when leaving union flyers around the facility was a threat of unspecified reprisals in violation of Section 8(a)(1) of the Act), citing *Metro One Loss Prevention Services Group*, 356 NLRB 89 (2010) (employer violates 8(a)(1) if it communicates to employees that it will jeopardize their job security, wages, or other working conditions if they support the union); *Baddour, Inc.*, 303 NLRB 275 (1991) (an employer’s threats of discipline or job loss for participation in protected concerted activities constitute violations of the Act). Therefore, this statement constituted a threat in violation of Section 8(a)(1) of the Act.⁶ The judge erred by concluding otherwise and must be reversed.

F. The judge erred in failing to consider the testimony of Kirk Garner, Timothy Ivory, and Bill Thomas, when conducting his polling/group interrogation analysis. (GC Exception 8)

⁶ Counsel for the General Counsel anticipates that Respondent’s counsel will make the same misguided argument to the Board that it made to the Administrative Law Judge: That because the Charging Party initially filed the underlying charge alleging that Fillmore’s statement promulgated an unlawful rule, then amended his charge to allege an unlawful threat, the statement should be reviewed as a rule and analyzed under the Board’s decision in *Boeing Co.*, 365 NLRB No. 154 (2017). (Respondent’s Post-hearing Brief at 16-20) This argument is erroneous. It is undisputed that Fillmore’s statement was made to exactly one person: Garner. It was not made in the presence of, nor repeated, to other employees. As the Board explained in *Orchids Paper Products Co.*, 367 NLRB No. 33 (November 20, 2018), a one-on-one communication does not evidence a rule promulgation, absent evidence that the prohibition was repeated to other employees “as a general requirement.” However, even if the Board applied *Boeing* to Fillmore’s statement, Respondent would be found to be in violation of Section 8(a)(1) of the Act, as Fillmore admitted that his statement was in response to Garner stating that Quality employees did not want to train contract employees, and the Board has explained that it may still find a rule unlawful if it was applied in response to an employee engaging in protected activities. See *Boeing Co.*, 365 NLRB No. 154, slip op. at 5.

G. The judge erred in his conclusion that Ivory’s questioning of employees on August 13 did not violate Section 8(a)(1) of the Act. (GC Exceptions 9, 10, 11, 12, 13)

In his decision, the judge discussed whether Ivory’s questioning of employees on August 13 constituted polling or interrogation, and he ultimately concluded that Ivory’s questioning constituted a “group interrogation.” The judge erred by relying on a false factual distinction between group interrogation and polling. See generally, e.g., *Rhode Island PBS*, 368 NLRB No. 29, fn. 17 (August 5, 2019) (...“To the extent (Respondent’s) questioning is considered polling, *it is plainly an unlawful interrogation.*”) (emphasis added).

“Under most circumstances, it is unlawful for an employer to systematically question employees about their (protected) activity.” *Special Touch Home Care Services*, 357 NLRB 4, 11 (2011), enf. denied on other grounds, 708 F.3d 447 (2nd Cir. 2013), citing *Johnnie’s Poultry Co.*, 146 NLRB 770, 775-776 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). The standard for determining whether an interrogation is unlawful is whether, “in light of the totality of the circumstances, it would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.” *Cott Beverages*, 367 NLRB No. 97 (February 27, 2019), citing *North Memorial Health Care*, 364 NLRB No. 71, slip op. at 30 (2016), enf. in relevant part 860 F.3d 639 (8th Cir. 2017); *Matthews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enf. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292-293 (1990).

In his analysis of the instant allegation, the judge erred by conflating the law as applied to interrogation about employee’s union/protected concerted activity *sentiments* (*Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985)) with the law as applied to interrogation about employees’ *plans to engage in a work stoppage* (*Preterm, Inc.*, 240 NLRB 654 (1979)).

The judge's reliance on *Preterm* was misplaced, as the factual setting there was significantly different from the facts of the instant case. In *Preterm*, the Board found a narrow exception to *Rossmore House* and held that a health care provider does not violate Section 8(a)(1) of the Act by asking employees whether they intend to engage in a work stoppage. However, the Board concluded in *Preterm*:

In order to lessen the inherently coercive effect of the polling of its employees, Respondent has an obligation to explain fully the purpose the questioning, to assure the employees that no reprisals would be taken against them as a result of their response, and to refrain from otherwise creating a coercive atmosphere. By the failure to of its representative to comply with these requirements in questioning a number of employees, Respondent interfered with, restrained, and coerced its employees in the exercise of their right to engage in protected, concerted activity.

Preterm, Inc., 240 NLRB at 656. Since *Preterm*, the Board has consistently found such questioning coercive where the employer fails to provide these assurances to employees. See, e.g., *Holyoke Visiting Nurses Ass'n*, 313 NLRB 1040 (1994) (employer violated Section 8(a)(1) of the Act by questioning employees regarding their intent to participate in a work stoppage without providing assurances that no reprisals would be taken based on the employees' responses).

In *Cott Beverages*, the Board adopted the Administrative Law Judge's conclusion that the employer violated Section 8(a)(1) of the Act by the manner in which it interrogated multiple employees regarding a petition signed by employees who sought to schedule a meeting with management about an ammonia leak and about employees' private discussions regarding a possible work stoppage if the employer refused to meet with them about the situation. Citing, *inter alia*, *Rossmore House*, it was concluded that, when determining whether questioning of employees is coercive it is appropriate to look at: (1) Whether the interrogated employees were openly and/or actively engaged in union activities; (2) whether assurances were given concerning the questioning; (3) the background and timing of the interrogation; (4) the nature of the information

sought; (5) the identity of the questioner; (6) and the place and method of the interrogation. Applying these factors, the Board adopted the Administrative Law Judge's conclusion that the employer's interrogation violated Section 8(a)(1) of the Act because the employer asked employees to identify whether they supported a work stoppage if management did not meet with them, the employer asked this of employees who had not previously revealed whether they were involved in these concerted discussions, and the employer failed to provide assurances that the purpose of the questioning "was benign and that their responses would not result in discipline." Although the employer established that it did not press employees for an answer when they expressed an unwillingness to answer, and that one employee testified that they felt "comfortable and under no pressure" during the questioning, the Board adopted the ALJ's conclusion that this evidence did not prevent the questioning from being coercive in violation of Section 8(a)(1) of the Act. *Cott Beverages, Inc.*, 367 NLRB No. 97.

In *Hyundai Motor Manufacturing Alabama*, 366 NLRB No. 166 (August 20, 2018), the Board considered an interrogation of employees who walked off their jobs, including asking these employees to state whether they had consulted with each other regarding walking off their jobs. Applying the *Rossmore House* factors, the Board concluded:

Here, we agree with the judge that (the) question was unlawfully coercive because (1) it unnecessarily delved into the employees' potentially protected conduct by directly inquiring into whether they had acted concertedly; (2) the questioning took place in the human resource representative's office and in the presence of Group Leader Terrence Brooks (3) the interview laid the groundwork for disciplinary action; and (4) it prompted two of the three employees to provide an untruthful or evasive answer.

Id. at 2.

In the instant case, Ivory unnecessarily delved into employees' protected conduct by, at the beginning of a group meeting conducted by a Group Leader, stating that Garner told Filmore that none of the employees wanted to train contract employees, then asking for a show of hands whether

or not that was true. This was a blatant attempt to identify other employees who engaged in protected concerted activity with Garner. It is undisputed that Garner was the only employee in the meeting who had communicated with Respondent regarding employees in the group not wanting to train contractors. Despite these facts, Ivory offered no assurances to employees that the questioning was benign and would not result in discipline. Ivory's questioning called for employees to respond in front of their coworkers and supervisors. These factors prompted Garner to provide an evasive answer denying that he engaged in the protected concerted activity, prompted employee Thomas to provide an evasive answer in which he refused to respond and prompted McCullough to say that Ivory should not solicit volunteers in that manner.

As pointed out by Ivory and Respondent's counsel, the evasive employee responses prompted by Ivory's polling persisted after the meeting adjourned. Ivory admitted that after the meeting, McCullough approached him and said, "I don't know what Kirk [Garner]'s talking about. I don't want no part of it," thereby making clear that he wanted to be as far removed from the protected concerted activity as possible. Respondent's counsel, in its cross examination of Thomas, also elicited testimony that after the meeting, Thomas approached Garner to express that he thought Ivory was wrong in how he handled the questioning.

Thus, even if the testimony of Respondent's witnesses is credited, and neither Garner, McCullough, nor Thomas made a statement in the meeting, the uncontradicted evidence still establishes that the group questioning prompted untruthful and evasive answers. Because of Ivory's questioning, it is undisputed that Thomas, who testified that he did not want to train, refused to raise his hand, and that McCullough was prompted to disavow involvement with Garner's protected concerted activities.

Ivory's questioning of employees on August 13 was designed to ascertain employees' sentiments about protected concerted activity that Garner brought to Respondent's attention, and it sought to identify employees engaged in protected concerted activity with Garner about not wanting to train contract employee. The questioning unlawfully delved into Garner's protected concerted activities, questioned employees who were not engaged in open and obvious concerted activity, was performed by a group leader in a group-wide meeting, provided zero assurances that the questioning was benign and would not result in discipline, and prompted evasive and untruthful answers from the employees who engaged in protected concerted activity prior to Ivory's questioning. As such, the record establishes that the questioning by Ivory was coercive and constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act. See *Cott Beverages*, 367 NLRB No. 97; *Preterm, Inc.*, 240 NLRB at 656; *Holyoke Visiting Nurses Ass'n*, 313 NLRB 1040; see also *Hyundai Motor Manufacturing Alabama*, 366 NLRB No. 166. The judge erred by failing to find a violation and must be reversed.

H. The judge erred in failing to make credibility determinations regarding the testimony of Michael Benson, Don Fillmore, Kirk Garner, Timothy Ivory, Liz Kelly, and Bill Thomas. (GC Exception 14)

Counsel for the General Counsel submits that the credibility of Garner's and Thomas's account of the August 13 interrogation is not determinative of whether Ivory's interrogation violated the Act. However, if the Board disagrees, the judge erred by failing to resolve credibility conflicts raised by the testimony of Benson, Ivory, and Kelly, whose testimony disputed Garner's and Thomas's accounts at trial. Therefore, if the Board concludes that the polling allegation hinges on the response of employees during the interrogation, the Board should remand the case to the judge for credibility determinations.

- I. The judge erred by recommending that the complaint be dismissed, by failing to recommend that Respondent be ordered to cease and desist its unlawful conduct, and by failing to recommend that Respondent be ordered to remedy its unlawful conduct. (GC Exceptions 15, 16, 17)**

As explained above, the judge erred by concluding that Respondent did not violate the Act as alleged in the complaint. Due to this error, the judge also erred by recommending that the complaint be dismissed, by failing to order Respondent to cease and desist, and by failing to order Respondent to remedy its conduct. The judge should be reversed, Respondent should be ordered to cease and desist its unlawful conduct, and Respondent should be ordered to remedy its unlawful conduct.

IV. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel respectfully urges the Board to reverse the Administrative Law Judge and find that Respondent violated the Act as alleged in the complaint, order Respondent to cease its unlawful conduct, and order Respondent to remedy the harm that it caused to employees, as requested in the complaint. Alternatively, the Board should remand this case to the Administrative Law Judge with directions to consider the complete record, apply the appropriate Board precedent, and to make any necessary credibility determinations. Proposed conclusions of law, a proposed order, and a proposed notice are attached to this brief.

Respectfully Submitted,



Joseph W. Webb
Counsel for the General Counsel
National Labor Relations Board, Region 10

APPENDIX I – PROPOSED CONCLUSIONS OF LAW

1. Respondent, Mercedes-Benz U.S. International, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by threatening employees with unspecified reprisals for engaging in protected concerted activities.
3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by polling and/or interrogating a group of employees regarding their protected concerted activities.
4. The aforementioned unlawful conduct engaged in by Respondent constitutes unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

APPENDIX II – PROPOSED ORDER

Respondent, Mercedes-Benz U.S. International, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Threatening employees who engage in protected concerted activities with unspecified reprisals.

(b) Polling or interrogating employees regarding their protected concerted activities and the protected concerted activities of others.

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

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

(a) Within 14 days after service by the Region, post at its facility in Vance, Alabama, copies of the attached Notice to Employees.⁷ Copies of the notice, on forms provided by the Regional Director for Region 10, 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, including but not limited to bulletin boards and closed circuit televisions at Respondent's facility. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to

⁷ 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."

all current employees and former employees employed by the Respondent at any time since August 24, 2018.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 10 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.

APPENDIX III – (Proposed) NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

YOU HAVE THE RIGHT to discuss your work assignments and working conditions with other employees, and **WE WILL NOT** threaten you with unspecified reprisals for doing so.

WE WILL NOT poll or interrogate you about whether you have discussed your work assignments and/or working conditions with other employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of Counsel for the General Counsel by electronic transmission on this date to:

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