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I. INTRODUCTION

The complaint alleges two Section 8(a)(1) violations of the National Labor Relations Act (“the Act”): (1) a Mercedes-Benz U.S. International, Inc. (“MBUSI”) supervisor unlawfully made a threat of unspecified reprisals for unspecified conduct when he told Charging Party Kirk Garner (“Garner”) not to “disrupt the group;” and, (2) a MBUSI supervisor unlawfully polled employees when he asked them if they were willing to perform a job duty after MBUSI was told no employees would perform the job duty.

After an evidentiary hearing, Deputy Chief Administrative Law Judge Arthur Amchan (“ALJ”) issued a decision based on his observations and determinations regarding the relative credibility of the witnesses and the supporting evidence. The ALJ rejected both allegations of the complaint. The ALJ correctly concluded that, based on the context of the statement and his credibility determinations, Garner was not threatened and, regardless, the challenged statement did not even refer to conduct protected under the Act. Likewise, the ALJ properly concluded that, based on the context and his credibility determinations, MBUSI’s non-threatening, one-time inquiry as to which employees would be willing to perform a critical job duty, after Garner repeatedly told MBUSI no one would perform the job duty, was not unlawful. The ALJ also correctly held that, alternatively, even if the *Rossmore House*, 269 NLRB 1176 (1984) interrogation factors applied, the questioning was not unlawfully coercive.

Counsel for the General Counsel (“CGC”) now files exceptions which do nothing more than except to the ALJ’s credibility determinations and the ALJ’s conclusions based upon his credibility determinations, and rely upon legal authority that is not applicable. CGC has failed to show by a clear preponderance of evidence that any aspect of the ALJ’s decision was incorrect. The judgments of the ALJ with regard to the credibility of witnesses and the weighing of evidence as to the complaint’s allegations are amply supported by the record and should not be disturbed.

II. STATEMENT OF FACTS

A. MBUSI.

MBUSI operates an automobile manufacturing facility in Vance, Alabama, its sole vehicle manufacturing facility in the United States. (Ivory, 108:21-25; Garner, 132:10-18; Thomas, 151:1-9, Kelly, 160:7-8; ALJD, 2:9-11).¹ In addition to MBUSI's regular employees ("Team Members"), over a thousand third party contractor workers work at MBUSI on a daily basis. (Fillmore, 51:7-14).

MBUSI's work culture is built upon its One Team approach. (Fillmore, 53:11-14; RX-2).

As explained in MBUSI's handbook, which is issued to all Team Members:

In Alabama, MBUSI created a new corporate culture based on teamwork and open communication. This "One Team" approach along with the combination of Germans, Americans, and other international Team Members made for a "melting pot" in MBUSI's practices, procedures and corporate culture.

...

More than anything else, it is the Team Members of MBUSI who have the greatest effect on our success. **At MBUSI, our "One Team" approach, the concept of all people working together and helping one another as a team, is one of the most important elements of our day-to-day working structure.** We believe the combined effect of working together with other Team Members is much more effective than if we were to work only as individuals.

(RX-2) (emphasis added) (see e.g., section "Teamwork", "Fair Treatment ... Mutual Trust and Respect" and "Open Communication"). The One Team approach emphasizes mutual trust, respect, teamwork and open communication. Team Members are encouraged to have an open dialogue and to resolve work issues in a constructive manner. (Id.) Abusive or intimidating conduct by Team Members is inconsistent with the One Team approach and not permitted. (Id.)

¹ References to the one-volume transcript and/or the ALJ's decision ("ALJD") will appear as page number: line number. CGC's hearing exhibits will appear as "GCX" and MBUSI's exhibits as "RX".

B. The Quality Department.

MBUSI has a quality department that inspects the quality of vehicles to ensure those vehicles meet the highest standards. (ALJD, 2:17-19; Fillmore, 24:20-23, 67:14-24; Ivory, 114:6-11, 130:13-15, 121:6-8; Garner, 132:21-24). The quality department operates on three shifts -- A and B-Shifts that rotate every two weeks and a straight night C-Shift² -- with each shift consisting of around 14 to 17 Team Members (ALJD, 2:19-22; Fillmore, 25:12-20; 26:18-20; Ivory, 115:20-22).³ Garner works on the C-Shift. (ALJD, 2:33; Fillmore, 25:11-13; Ivory 116:6-12, 122:17-21; Garner, 135:11-17).

The quality department has two front-line supervisors referred to as Group Leaders. (ALJD, 2:26-27). The A-Shift Group Leader is Tim Ivory (Ivory). (Id.). After graduating from high school, Ivory started at MBUSI as an hourly Team Member and worked his way up to Group Leader, and has worked for MBUSI for 22 years (Ivory, 109:6-7, 115:4-10, 116:16-20). The B-Shift Group Leader is Don Fillmore (ALJD, 2:26; Fillmore, 25:15-17). After completing six years of military service, Fillmore began employment at MBUSI as an hourly Team Member, worked his way up to Group Leader, and has worked for MBUSI for 23 years. (Fillmore, 24:11-14, 47:4-5).

There is not a front-line supervisor (Group Leader) assigned to C-Shift and, for most of the shift, there is no Group Leader present. (ALJD, 2:28; Fillmore, 78:4-14; Ivory, 116:21-24, 117:10-16). However, Ivory and Fillmore's beginning or end of shift will briefly overlap with parts of C-

² The C-Shift runs from 9:39 p.m. on Sunday to 6:21 a.m. and then, on Monday through Thursday, from 10:39 p.m. through 6:21 a.m. As noted above, the A and B-Shift rotate every two weeks. The day shift generally runs from 6:15 a.m. to 2:27 p.m., while the evening shift generally runs from 2:27 p.m. to 10:45 p.m. (Ivory, 115:11-22).

³ There is a "static" team and "dynamic" team. (ALJD, 2:20-22; Ivory, 121:25-122:7).

Shift (depending on the rotation) and one of them will conduct the C-Shift's daily pre-shift meeting. (ALJD, 2:28-29; Fillmore, 25:11-20; 78:4-6; Ivory, 116:16-24, 117:17-25, 118:1-16).

As part of the quality review process, Garner, and other quality co-workers, review vehicles using an over 500 point checklist (covering everything from the license plate molding to the roof paneling). (Fillmore, 69:7-19, 70:11-15; Ivory, 120:20-24; RX-3). Completion of the checklist review requires precision, attention to detail and complete concentration. (Fillmore, 66:11-12, 69:13-17, 70:7-71:4). The quality team's work is critical as it is the last review before a vehicle goes to the public, and MBUSI's vehicles must be "perfect." (ALJD, 2:17-19; Fillmore, 67:14-68:1; Ivory, 121:3-10).

C. Team Member Training Job Duties.

As part of the quality process and the One Team approach, MBUSI uses a unique long-standing training program that involves qualified Team Members training others newly assigned to the work area. (Fillmore, 24:18-25:1, 60:7-14, 60:22-61:2, 65:24-66:7). A Team Member becomes qualified to train others when he or she reaches Level 4 (out of four) on MBUSI's Circle of Skills Training program ("Level 4").⁴ (Fillmore, 74:17-75:11; ALJD, 2:31-33). Team Members eligible to train will do so as part of their normal job duties, during normal work hours, and the training is paid time. (Ivory, 124:25-125:1; Garner, 145:21-24).

Training is an essential part of the teamwork and collaborative aspect of MBUSI's One Team culture. (Fillmore, 60:7-61:3; Ivory 124:4-7; Garner, 145:21-24; RX-2). MBUSI relies on its Team Members, many whom are long-term employees, to share their knowledge and experience

⁴ The Circle of Skills consists of four training levels. A Team Member who is at Level 1 is a beginner on the work processes. A Team Member who is at Level 2 can work the processes with assistance. A Team Member who is at Level 3 can work by himself on the processes. A Team Member who is at Level 4 can train others on the processes. (ALJD, 2:31-33; Fillmore, 74:17-75:11).

to help ensure persons new to a work area learn and develop the proper skills and processes. (Fillmore, 65:17-66:7, 71:5-10, 73:4-6; Ivory, 124:14-17).

In the quality department, C-Shift has roughly eight Team Members, ranked as Level 4 in the Circle of Skills, including Garner. (ALJD, 2:33; Fillmore, 63:3-9). Garner and other Level 4 Team Members have routinely trained persons newly assigned to the department. (Fillmore, 58:18-22, 60:7-21; Ivory, 124:14-125:1; Garner 145:21-24). No quality Team Member ever before has refused to perform his or her training job duties. (Fillmore, 76:10-12, 97:16-19; Ivory, 124:18-24). Properly training new hires in the quality department is particularly critical and necessary because of the high stakes in ensuring vehicles leave the plant without defect or issue. (Fillmore, 24:18-25:1). Indeed, if Team Members were not willing to perform their training job duties, it could lead to poor training, which would negatively impact quality and production. (Fillmore, 89:19-90:8).

D. MBUSI's Plant Expansion.

In 2018, MBUSI began a launch of multiple new vehicles that were more complicated and complex than previous vehicles built. (ALJD, 2:16; Fillmore, 27:1-6, 59:7-17, 68:11-69:2; Ivory, 123:17-19). The new vehicles would be reviewed and graded by J.D. Power (called "the J.D. Power initiative") and it was critical that MBUSI score as high as possible. (Id.) The quality team was tasked with ensuring these new, more complex vehicles met MBUSI's exact standards, which required that the quality team learn new processes and apply different quality checks, in addition to their regular quality review job duties. (Id.)

Given the increased expected workload, MBUSI made the business decision to bring in temporary contract workers to support the quality team. (ALJD, 2:16-17; Fillmore, 51:3-6; Ivory, 123:17-124:3). Over the years MBUSI has used contract workers to meet its business needs. (Fillmore, 50:22-51:2). In early August 2018, Fillmore notified C-Shift quality Team Members in

a regularly scheduled pre-shift meeting in the group's team center that, as part of the plant expansion and new model introduction, third-party contractors would be temporarily assigned to work in quality. (ALJD, 2:31-33; Fillmore, 25:21-26:17; Ivory, 123:17-25; Thomas, 152:7-11). While the contractors would not displace any MBUSI Team Members (Ivory, 124:4-11), they would have to be able to perform the regular quality Team Member job duties, (Fillmore, 59:6-17, 60:1-6, 70:14-71:1). Consistent with past practice for contractors newly placed in the quality department, MBUSI anticipated that their training would be performed by qualified Level 4 Team Members on their shift. (ALJD, 2:31-33; Fillmore, 58:18-22, 60:7-21; Ivory, 124:14-125:1). The training would last a couple of weeks and, due to the complexity of the vehicle inspections, would require that multiple Team Members provide training support. (Fillmore, 58:18-22, 60:7-21, 71:2-10, 72:22-73:24; Ivory, 124:1-7; RX-3, RX-4, RX-5).

Garner testified that after the meeting, he spoke with three of the fifteen quality Team Members on C-Shift, Kiley Medders, Bill Thomas and Thomas McCullough, about training. (ALJD, 2:35-36, Garner, 134:12-15). Thomas testified at the hearing that he told Garner that he would "prefer not to [train], but that [he] would do as [he] was told." (Thomas, 153:3-6). However, despite what Thomas may have told Garner, the undisputed evidence is that when Thomas was given the opportunity to train he voluntarily agreed to do so. (Garner, 148:16-18). Garner did not testify that Medders or McCullough told him they did not want to train, or anything like that. Further, Medders and McCullough were not called to testify by CGC. There is no evidence that any employees other than Garner intended to refuse to perform their training job duties.

E. Garner's Threats of Work Interference.

After it was announced that temporary contractors would be assigned to work in Quality, Garner went to MBUSI's human resources department and announced that he did not want to train

the contract workers. (ALJD, 2:33-36) A human resources representative told Garner that he did not have to do so. (Id.)

Subsequently, on August 9, 2018, Garner approached Group Leader Fillmore and told him that he did not want to train contract workers and that "no one else" in the group wanted to train them either (which was a lie). (ALJD, 3:2-4; Fillmore, 30:9-20; Ivory, 125:17-24; Garner 144:4-18; RX-6). He also stated during the conversation, on multiple occasions, that no one wanted the contractors working at MBUSI (which was also a lie). (ALJD, 3:2-4, 11-12; Fillmore, 30:14-17; Garner, 144:4-145:7; RX-6). Garner was by himself. Garner identified no others who supposedly did not wish to train and no one else had complained about the contractors. (ALJD, 3:4-5; Fillmore, 30:24-31:4). Fillmore encouraged Garner to speak with HR about the issue and Garner retorted that he already had and was not required to train. (ALJD, 3:5-7; Fillmore, 31:11-18; RX-6). Fillmore said he would follow Human Resource's instruction. (ALJD, 3:5-9; Fillmore, 31:19-24; RX-6). Fillmore said nothing threatening.⁵ (ALJD, 3:31-36). Fillmore thanked Garner. (Fillmore, 30:21-23; 103:13-20; RX-6). However, Fillmore was concerned that Garner intended to somehow make things difficult and even hostile for the MB Tech contractors. (Fillmore; 83:14-84:13).

Fillmore then spoke with his supervisor, Demetrius Malone, about the conversation. (Fillmore, 32:3-33:7). They discussed Garner's insistence that he and others did not want to train and did not want contractors in the area. (Fillmore, 32:23-33:4).

The next day, Garner spoke to Fillmore again. (ALJD, 3:11, Fillmore, 33:8-17, Garner, 144:4-145:14; RX-6) Garner, again, was adamant that he did not want to perform his training job duties for the contract workers when they arrived. (ALJD, 3:11-12; Fillmore, 33:19-34:2; Garner,

⁵ It was the first time an employee had ever told Fillmore that he was refusing to perform his job duties. (Fillmore, 97:16-19).

144:4-145:14; RX-6). He also was adamant that no one wanted them at MBUSI and no one wanted to train (again, this was a lie). (ALJD, 3:11-14; Fillmore, 90:15-22; Garner, 144:4-145:14; RX-6) Garner had now, five times, stated he did not want the contractors at MBUSI and no one wanted them there. (Fillmore, 87:18-88:4, 96:15-23; Garner, 144:4-145:14; RX-6). Fillmore, concerned that Garner was going to interfere with work and mistreat and harass the contract workers, told him that "we all got a job to do and I'm not quite ready to retire yet, so until then, we all have a job to do." (Fillmore, 34:3-16; RX-6). In response to Fillmore's statement that "we all got a job to do," Garner mockingly told Fillmore that MBUSI would be "embarrassed" with how the contractors would be treated. (ALJD, 3:12-14; Fillmore, 85:17-86:3; Garner, 144:22-145:7; RX-6) ("you all get embarrassed because no one wants them in here and doesn't want to train them."). Fillmore, naturally, concluded that if MBUSI would be "embarrassed", it would mean that Team Members were refusing to perform their job duties or might harass and mistreat the contract workers. (Fillmore, 86:22-87:10, 97:15-19; RX-6). Fillmore asked Garner if Human Resources had stated Team Members qualified to train would not have to train, to which Garner responded yes. (ALJD, 3:6-7; Fillmore, 31:11-18; RX-6).

The issue appeared resolved. Fillmore, thus, ended the conversation by simply asking Garner to "please" not "disrupt the group" because "we all have a job to do, and it's going to take everyone to do it." (ALJD, 3:14-16). Fillmore testified he only meant to remind Garner to focus on the task at hand, not to disrupt production and operations, and treat everyone with respect consistent with MBUSI's One Team approach because failure to do so would not be good for

Garner, his co-workers, the contractors, Fillmore or MBUSI. (Fillmore, 89:11-90:13, 96:15-97:15).⁶ Garner did not testify that he felt threatened or coerced.

The quality department was in the middle of expanding its coverage over new production lines and integrating new workers, and interference with work in the quality department would have affected everyone on the team and interfered with MBUSI's business goals. (ALJD, 4:36-5:5; Fillmore, 68:9-69:2; Ivory, 123:17-124:3). Fillmore was polite and cordial and nothing threatening was stated. (ALJD, 3:35-36; Fillmore, 90:19-92:3). Indeed, Fillmore documented verbatim his conversation with Garner, certainly not something a front line supervisor would do if threatening an employee. (Fillmore, 96:15-97:3, RX-1, RX-6). Garner was not disciplined or subject to any reprisals. (Fillmore, 92:16-18). Fillmore never subsequently discussed the issue with Garner and, after the conversation, Garner continued to discuss the contractor training issue with his co-workers. (Fillmore, 41:17-21, 91:24-92:3; Garner, 133:19-24, 145:17-20). Fillmore did not discuss the conversation or discuss contractors with any other Team Members.

F. Announcement That Training is Voluntary.

Because MBUSI had decided to make the previously required training job duties voluntary, it had to notify the affected Team Members to determine who would be willing to train. (ALJD, 3:30-31). Indeed, Fillmore and Group Leader Ivory were both concerned that no Team Members would be willing to train. (ALJD, 4:36-5:5; Fillmore, 83:14-25, 84:5-10, 99:5-24; Ivory, 110:2-12, 125:17-126:9, 130:21-131:3). The staffing concern was very real (and not merely hypothetical) because Garner had, on multiple occasions, asserted, *no Team Members wanted to train* -- even telling MBUSI it would be "embarrassed" when no one volunteered to train. (ALJD, 3:12-14;

⁶ Fillmore documented verbatim what he and Garner said to each other in this brief conversation. (Fillmore, 96:15-97:3, RX-1).

Fillmore, 85:17-86:3; Ivory, 125:17-126:9; Garner 144:22-145:7). If no (or just a few) Team Members were willing to train, MBUSI would naturally have to make appropriate arrangements - for example, schedule contractor(s) to work when willing Team Members would be present⁷ or realign management personnel to be available to train.⁸ (ALJD, 4:36-5:5; Fillmore, 99:5-24; Ivory, 125:25-126:9). Without proper training, the contractors would not be able to perform their job duties and it would potentially interfere with MBUSI's production and quality. (ALJD, 4:36-5:5; Fillmore, 59:6-17, 60:1-6, 65:17-19, 70:21-71:4). Moreover, Fillmore and Ivory did not want Team Members to train the contractors when they did not want to do so as they believed under such circumstances those Team Members would not do a good job with the training. (Fillmore, 86:22-87:10; Ivory, 128:15-20).

On or around August 13, 2018, Group Leader Ivory conducted his regular pre-shift meeting. (Ivory, 118:25-119:6, 128:11-14). MBUSI Group Leaders conduct regular pre-shift meetings with their team before every shift start to discuss various work issues applicable to the team and MBUSI. (Ivory, 118:7-24; Kelly, 160:19-161:17; Benson, 166:7-24). The meetings are held in a team center, which are open air areas on or near the production floor that are used for work and breaks. (Ivory, 119:5-120:12). For example, MBUSI's previous announcement about contractors being assigned to quality had occurred in a team center as part of a pre-shift meeting.

In the August 13, 2018, meeting, Ivory discussed various work issues, including staffing for training the new contractors. (Kelly, 160:19-161:17; Benson, 166:7-24). To determine who was willing to train, Ivory stated that Garner stated that no one wanted to train the contractors

⁷ This would require ensuring the training Team Member is working the same shift as the contractor and not on vacation, or otherwise not working when needed to train.

⁸ Group Leaders would have to be pulled away from their normal job duties to train.

(which Garner repeatedly has said (Garner, 144:4-145:7)) and asked Team Members to raise their hand if they would not be available to train. (Ivory, 111:6-13; Kelly, 161:2-13; Benson, 166:17-19). Ivory mentioned Garner in his discussion because Garner had told Fillmore he had discussed the issue with the whole team and that it was out in the open and Ivory wanted to give context on why the question was being asked. (Ivory, 110:25-111:5; Kelly, 161:2-13). Ivory also explained that Team Members could speak with him privately if they felt more comfortable doing so. (Ivory, 111:6-10, 111:20-22). Ivory told Team Members they did not have to train. (Ivory, 128; Benson, 168). Ivory did not tell anyone they had to train or request that they stop from discussing "training." (Ivory, 128:11-14). Ivory did not inquire about the substance of any conversations anyone had about "training" contractors or even why some persons may not want to train. (Ivory, 130:3-9, 131:4-6).

The other Team Members who were at the meeting testified that it was just a routine meeting, that no one was threatened, intimidated or questioned about their views as to unions, contractors, or training contractors, and that the meeting was a nonevent. (Kelly, 161:2-13; Benson, 166:7-167:18).

Garner's testimony about the meeting varied slightly, but his testimony should be given no weight. He claims at the small team meeting that he asserted in front of everyone, "I did not say no one wanted to train." (Garner, 135:18-136:4). Ivory denied Garner made this statement. (Ivory, 158:10-21). CGC's witness Thomas denied Garner made such a statement. (Thomas, 153:7-18). Witnesses Kelly and Benson denied Garner made any such statement. (Kelly, 163:6-8; Benson, 166:11-24). Thus, all witnesses dispute Garner's version of the events. The ALJ did not credit Garner with making the statement (ALJD, 3:18-24). Garner's contradicted testimony continued. Garner then alleges that Thomas stated in the meeting "I don't want to get involved." (Garner,

138:12-13). Not only does Ivory deny that Thomas made that statement, and no other witnesses corroborated Garner's story, *Thomas, CGC's witness, upon cross examination denies he made that statement in the meeting.* (Ivory, 111:18-22, 158:10-17; Thomas, 156:23-157:5; Kelly, 162:23-163:2; Benson, 166:11-24). Thomas also later provided training. (Garner, 148:16-18). The ALJ did not credit Garner's testimony that Thomas made this statement. (ALJD, 3:18-24). Garner then alleges McCollough stated in the meeting "he didn't think Mr. Ivory should be doing it this way." (Garner, 138:4-9). Ivory denies McCullough made such a statement. (Ivory, 158:18-19). None of the other three witnesses who were present at the meeting corroborate that such a statement was made and CGC did not even call McCollough to testify. (Thomas, 154:15-19; Kelly, 162:23-163:2; Benson, 166:11-24). The ALJ did not credit Garner's testimony that McCollough made this statement. (ALJD, 3:18-24). Ivory, on the other hand, testified (and before Garner manufactured the McCullough statement) that McCullough approached him after the meeting and indicated his willingness to train. (Ivory, 111:23-25, 112:9-25). McCullough later provided training. (Garner, 148:8-15). In addition to his contradicted testimony about the meeting, Garner lied at the hearing on other, critical matters. For example, he initially testified that he "never told anybody in management that nobody wanted to train" the contractors, (Garner, 140:24-25), but, after being presented with his Board affidavit, admitted that was not true and that on August 10, 2018 he told Fillmore "I just want you to understand that we don't want to train them or want them in here," (Garner, 144:10-14), and then said "you all get embarrassed because no one wants them in here and doesn't want to train them." (Garner, 145:1-4). Garner has no credibility and the ALJ gave his testimony no weight.

In response to Ivory's question, Team Members Medders and Garner indicated they did not wish to train. (ALJD, 3:21-23; Ivory, 111:8-19, 123:10-16; Garner, 136:6-16). Ivory was, thus,

able to determine who would be willing to train and how to staff operations accordingly. (Ivory, 130:21-131:3). Once Ivory had the information needed, he did not ask any further questions about the issue. The meeting was cordial and not threatening in any way. (Ivory, 129: 7-12; Benson, 167:8-18). The two persons who raised their hands were not required to train, and did not receive any discipline, nor were they threatened with discipline. (Ivory, 111:6-19). One employee approached Ivory afterwards and stated he was willing to train. (Ivory, 111:23-112:12). After the meeting, Garner and some Team Members continued to discuss the contractor training issue. (Garner, 133:19-22; Thomas, 152:7-14, 152:19-24). Ivory and Garner get along and see each other frequently. (Ivory, 123:2-5).

G. Procedural History.

On August 24, 2018, Garner filed an Unfair Labor Practice Charge against MBUSI alleging that MBUSI violated Section 8(a)(1) of the Act by orally promulgating an overly broad rule prohibiting employees from discussing their terms and conditions of employment. (Webb, 5:20-6:8; GCX-1(a)). The charge did not allege that Garner felt threatened or coerced. (*Id.*)

Subsequently, over two months later, on October 23, 2018, Garner filed his First Amended Charge, alleging, again, an unlawful work rule (he did not allege that he felt threatened or coerced) and also alleging MBUSI violated Section 8(a)(1) of the Act by unlawfully polling employees. (Webb, 5:20-6:8; GCX-1(c)).

Finally, almost five months later, on January 8, 2019, Garner filed a Second Amended Charge changing his verbal work rule theory to a threat theory.⁹ (Webb, 5:20-6:8; GCX-1(e)). Specifically, that MBUSI violated Section 8(a)(1) of the Act by threatening employees with

⁹ As discussed in MBUSI's cross-exceptions, this case is a work rule case and simply requires application of *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017) to determine the challenged statement was lawful. (MBUSI's Cross Exceptions, filed 9/6/2019, p. 4-6).

unspecified reprisals if they engaged in protected activity. (Id.) Garner also re-asserted his polling theory from his First Amended Charge. (Id.)

On March 12, 2019, the Regional Director issued a Complaint and Notice of Hearing ("Complaint"), pursuant to the Second Amended Charge. (Webb, 5:20-6:8; GCX-1(g)). The Complaint alleged that a MBUSI supervisor threatened employees with unspecified reprisals and polled employees about their protected concerted activities which violated Section 8(a)(1) of the Act because it interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act. (Id.) On March 27, 2019, MBUSI timely filed an Answer denying all the material allegations and asserted affirmative defenses. (Webb, 5:20-6:8; GCX-1(i)).

The hearing on the Complaint was conducted June 19, 2019, in Birmingham, Alabama before the ALJ. First, the ALJ held that Fillmore did not threaten Garner. (ALJD, 3:35-36, 4:6-7). The ALJ stated "Fillmore did not hint at any adverse consequences if Garner continued to refuse to perform this training" and "Fillmore also did not threaten Garner will [sic] any adverse consequences if Garner encouraged other employees to opt out of the training." (ALJD, 3:31-36). The ALJ also held, alternatively, the challenged statement was not linked to protected conduct. The ALJ stated nothing reflected that "Fillmore or Respondent would retaliate against Garner or anyone else if Garner encouraged others to refuse to train the temps or protest this assignment." (ALJD, 4:4-6). Instead, the ALJ explained a reasonable employee would have interpreted Fillmore's statement as referring to unprotected types of work interference -- as a request for Garner to not make it more difficult to train the contract workers (ALJD, 3:41-4:4), to not harass the contract workers (make the contract workers feel "unwelcome" (Id.)) or to not interfere with

Fillmore’s ability to perform his job duties because Garner and others refused to perform their job duties (would make “Fillmore’s life more difficult” (Id.)).

Second, the ALJ held Ivory did not unlawfully poll or interrogate Team Members. (ALJD, 4:37-38). The ALJ found, based on the statements by Garner, there was a risk of a partial strike. The ALJ explained “a mass refusal to perform an assigned task could be an illegal partial strike” (ALJD, fn. 4), and MBUSI could have, simply, told “employees that if they came to work, they would be required to train the temporary workers.” (ALJD, fn. 7). The ALJ also found the partial strike would impact MBUSI’s ability to properly staff its business, explaining MBUSI was “unsure as to whether or not a sufficient number of Level 4 employees would be willing to train the temp workers” and the company needed “to plan for the training of the temp workers.” (ALJD, 4:38-5:2). Given the circumstances, the ALJ correctly found it was clearly “reasonable” for MBUSI to ask which employees would be willing to perform their training job duties when it had a good faith concern that no employees would be willing to do so and the inquiry was “non-coercive.” (ALJD, 5:1-2). The ALJ specifically noted, alternatively, he would also consider the *Rossmore* factors because the “General Counsel briefed this case as an interrogation” case¹⁰ and, under those factors, the inquiry was not coercive. (ALJD, 4:22-5:1-2).

III. THE CGC’S EXCEPTIONS ARE WITHOUT MERIT AND SHOULD BE REJECTED

A. The Board Should Not Overrule The ALJ’s Credibility Determinations.

The Board affords a significant amount of deference to an ALJ findings regarding credibility. *See, e.g. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). ALJs are uniquely

¹⁰ As discussed in MBUSI’s cross-exceptions, the “interrogation theory” was not raised until CGC’s post-hearing brief, and CGC cannot inject a new theory into a case via a post-hearing brief. (MBUSI’s Cross Exceptions, filed 9/6/2019, p. 4-6).

positioned to observe the witnesses' demeanor and to hear them testify. Moreover, credibility determinations may also be based on the weight of the respective evidence, established facts, inherent probabilities, and reasonable inferences which may be drawn from the totality of the record. *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996); *Medeco Security Locks, Inc.*, 322 NLRB 665 (1996).

Accordingly, an ALJ's credibility determinations should only be overturned if the "clear preponderance of the evidence" shows that the credibility determinations were, in fact, incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). This is a highly deferential standard, which demands significant evidence in order to disturb an ALJ's decision.

B. The ALJ Correctly Found That CGC Failed To Meet His Burden Of Proof To Show MBUSI Unlawfully Threatened Garner.

CGC's exceptions to the ALJ's dismissal of the Section 8(a)(1) threat allegation are due to be rejected. The lawfulness of an alleged Section 8(a)(1) threat is assessed in the context in which it is made and whether it tends to coerce a reasonable employee in the exercise of protected rights. *Didlake, Inc.*, 367 NLRB No. 125, at *3 (May 10, 2019); *Westwood Health Care Ctr.*, 330 NLRB 935, 940 n.17 (2000). Further, even if a threat is made, if it is not linked to protected rights it is not unlawful. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1064 n.3 (2007) (Board majority and dissent debating whether threat to close facility was linked to an incident of vandalism or to employee protected activities), *enfd.*, 577 F.3d 467 (2d Cir. 2009); *PCL Constr.*, 269 NLRB 16, 16 (1984) (Board finds supervisor's statement to union steward that he would "shut the God damn job down" was not related to the steward's protected activities, but was directed to his personal difficulties with other employees).

Here, the ALJ correctly concluded there was no threat. (ALJD, 3:35-36). The ALJ also correctly concluded, based on the totality of circumstances, the alleged threat was not linked to

protected rights. (ALJD, 4:6-7). CGC in response makes meritless, general attacks on the ALJ's credibility determinations and cites legal authority which the ALJ rightly called "easily distinguishable."

1. The ALJ Correctly Held That MBUSI Did Not Unlawfully Threaten Garner.

The ALJ correctly found that, based on his credibility determinations and consideration of the context of the statements, Fillmore "did not interfere, with coerce and restrain Garner in the exercise of his Section 7 rights." (ALJD, 4:6-7). The ALJ identified the facts that supported his findings and clearly explained his basis for concluding that there was (1) no threat and (2) the challenged statement was not connected to protected conduct. CGC's arguments are convoluted challenges to the ALJ's credibility determinations and reasonable inferences therefrom and must be rejected.

First, CGC claims there was an "implicit" threat of adverse consequences based on Fillmore's statement that, if Team Members refused to perform their training job duties, it will "not be good for anyone" because everyone has "a job to do, and it's going to take everyone to do that." (CGCB, p. 13). The ALJ, however, flatly rejected that this exchange contained a threat. The ALJ held there was not even a "hint" of a threat during the conversation between Fillmore and Garner. (ALJD, 3:31-36)("Fillmore did not hint at any adverse consequences if Garner continued to refuse to perform this training"); (*Id.*)("Fillmore also did not threaten Garner will [sic] any adverse consequences if Garner encouraged other employees to opt out of the training."). Rather, the ALJ noted and based on the context - including that Fillmore's statement was in response to Garner's threat that MBUSI "would be embarrassed because nobody wanted to train the contract employees" (ALJD, 3:40-41) - Fillmore was making the common sense, non-threatening point that if Team Members are not performing their job duties it would create more work for everyone. (ALJD, 3:33-35 and 4:1-4). As the ALJ explained "there is nothing illegal in Fillmore pleading

with Garner to refrain from getting other employees to refrain from doing the training when nobody else had indicated to Fillmore that they did not intend to do it.” (ALJD, 3:33-35).

And, there certainly was not a threat. Fillmore did not do or say *anything* threatening. For example, he did not mention discipline, state he was warning Garner, inform Garner he would report his behavior to management, or contend he would be watching Garner going forward. Fillmore did not even pry into Garner's future intentions or who Garner had spoken with. At all times Fillmore was polite and cordial. Indeed, not even Garner testified he felt threatened. Garner also did not even allege a threat or threatening behavior in his first two unfair labor practice charges and, as discussed above, continued to discuss the contractor issue with his co-workers and others. The ALJ properly evaluated the testimony of Garner and Fillmore and described the context and factors he considered in reaching his conclusion that there was not even a “hint” of a threat. Without a threat, the threat allegation fails.

Second, CGC claims the alleged threat mattered because it was connected to Garner raising protected work complaints about the contract workers on his own behalf, as well as on behalf of others. (CGCB, p. 10). However, CGC fails to acknowledge that the ALJ found, given his credibility determinations and the context, a reasonable employee would not have considered Fillmore’s response related to protected rights. Specifically, the ALJ found a reasonable employee would not have considered Fillmore’s challenged statement referring to “if Garner encouraged others to refuse to train the temps or protest this assignment.” (ALJD, 3:41-4:6). Instead, the ALJ found that the reasonable interpretation of the statement was that Fillmore was referring to work interference, particularly because Garner had threatened Fillmore with “embarrassment” and had repeatedly antagonized Fillmore about the issue (ALJD, 3:39-41), and Fillmore specifically referenced work interference numerous times in the conversation. (ALJD, 3:11-16). The ALJ

explained the types of work interference to which the challenged statement could have referred: a request for Garner to not interfere with Team Members' training job duties (ALJD, 3:41-4:4), a request for Garner to not harass the contract workers (make the contract workers feel "unwelcome") (Id.), or a request for Garner to not refuse to work as it would impact Fillmore's ability to perform his job duties (would make "Fillmore's life more difficult") (Id.). CGC simply disagrees with the ALJ's fact finding that the statement was not related to protected rights but offers no reason to disturb the determination.

And, there is none. Fillmore did not make a blanket prohibition on discussing concerns about contractors, nor did he identify specific conduct in which Garner could not engage nor was the conversation even directed specifically to Garner as it referenced the impact on everyone from work interference. Further, the context matters, which the ALJ correctly noted and which CGC ignores. Both before and after the conversation, Garner freely and openly discussed his feeling about contractors with his fellow Team Members, human resource representative, and MBUSI management without any interference or threats. (ALJD, 2:33-36, 3:5-9). Garner even received the outcome he sought as he and other quality Team Members were not required to perform their training job duties (even though, MBUSI could have required them to do so). (Garner, 147:12-18). Considering the totality of the circumstances, the ALJ properly found the challenged statement was not linked to any protected rights.

In sum, the ALJ categorically and unequivocally found there was no threat. He also found the challenged statement was not connected to protected conduct. CGC's exceptions here are nothing more than a rehashing of a credibility determinations with which CGC disagrees and CGC has provided no basis to overturn the ALJ's sound decision.

2. CGC's Legal Authority Is "Easily Distinguishable."

CGC also implores the Board to find persuasive three cases the ALJ correctly found were "easily distinguishable." (CGCB, p. 11-13). The cases certainly are "easily distinguishable" and have no application here.

All three cases involve environments permeated with unlawful conduct, explicit threats connected to protected conduct and statements substantially different from the one here. In *United Foods Management*, 234 NLRB 744 (1978), the employer, after expressing disdain for a union organizing effort, told an employee that two prominent union organizers' employment ended for "stirring up trouble." *Id.* at 748. Unlike the situation here, and in addition to finding the discharges were unlawful and various other violations of the Act, the ALJ concluded the clear import of the statement to the employee was "that the two employees had been discharged for engaging in union activity." *Id.* at 747. Thus, the ALJ concluded, based on the context, that the statement was an explicit threat that employees who engage in union activity would be fired.

In *Boese Hilburn Electric. Serv. Co.*, 313 NLRB 372 (1993), after firing an employee for her protected activity, the employer told that employee not to stir up a "bunch of shit on the work floor." *Id.* at 373. In addition to finding the discharge was unlawful, the statement was found unlawful because "when viewed in light of Zuck's prior statement that Burke's involvement in concerted activities had played a role in her selection for layoff, we find that Burke could reasonably have viewed this statement as an order not to discuss her termination with her coworkers." *Id.* at 374. Unlike the situation here, the statement in *Boese Hilburn Electric. Serv. Co.* was a threat and was expressly connected to prohibiting the exercising of protected rights.

In *Astro Tool & Die Corp.*, 320 NLRB 1157 (1996) the employer committed various unfair labor practices. After an employee engaged in protected conduct, the employer her to stop complaining and threatened that "this is your very last warning," which meant she had "no future"

with the company “as long as she continued to complain.” *Id.* at 1163. The ALJ determined the company was laying the groundwork for discharge, and the company in “unprecedented fashion” began an investigation into the employee’s activity and began questioning co-workers about the employee. Three weeks later, the employee was discharged. Unlike the situation here, the statement in *Astro Tool & Die Corp.* was a direct and explicit threat prohibiting the employee from engaging in future protected conduct.

Contrary to CGC’s argument, the cases have no applicability. They involve substantially different statements, different contexts (environments permeated with unlawful conduct), “explicit threats” (here, there was no threat) and a direct connection between the challenged statement and protected conduct (here, there is no connection). As the ALJ noted, they are “easily distinguishable.” A case, however, with similarly language is *Colony Knitwear Corp.*, 217 NLRB 245 (1975), when the Board affirmed the ALJ’s finding that the employer did not violate Section 8(a)(1) of the Act where the company’s president told the employee that “he wanted 8 hours of work from him and that he should not disrupt the work of employees.” Here, as in *Colony Knitwear Corp.*, a statement about disrupting work is not unlawful, and CGC’s contrary cases have no applicability.

3. CGC Attempts To Rely On Irrelevant Facts And Cases.

The bulk of CGC’s exceptions are dedicated to an argument that the ALJ erred because he did not expressly discuss Fillmore’s statement that “I’m not quite ready to retire.” This, however, is simply a meritless credibility challenge and, regardless, it does not matter as the statement was certainly not a threat and CGC’s cases have no applicability.

CGC claims that Fillmore statement that he is “not quite ready to retire” is a threat about “[Fillmore] and Garner’s job security.” (CGCB, p. 10). The alleged statement plainly was not a threat. It was simply a colloquial statement that there is work to do and Fillmore cannot, as an

alternative, retire and stop working. It was not a threat that Fillmore was going to retire in retaliation and certainly was not a threat that Garner's job security was at stake. The ALJ properly evaluated the testimony of Garner and Fillmore and was not required to discuss and analyze every phrase, particularly phrases that do not matter. The ALJ categorically and unequivocally found there was no threat and that finding should not be disturbed.

The crux of CGC's argument is that the alleged statement matters because two cases, *Somerset Shirt & Pajama Co.* and *Packer Industries*, indicate the Board has "long held" similar statements to "retire" are unlawful. *Somerset Shirt*, 238 NLRB 1160 (1978); *Packer Industries*, 228 NLRB No. 25, slip op. at 4 (1977). (CGCB, p. 11). These two cases show nothing of the sort.

In *Somerset Short & Pajama Co.*, the owner of the plant, Katz, told employees "on several occasions" he would close the plant and retire "if the employees voted to select the Union as their bargaining representative." 238 NLRB at *2. Finding his threats unlawful, the Board stated "Katz's threats to retire were inextricably linked to his repeated threats to close the plant if the employees voted for the Union as their exclusive bargaining representative." *Id.* at *3.

Similarly, in *Packer Industries*, the president told an employee union organizer that he heard they were trying to organize the plant, he was not going to have a union, he would fire anybody who was organizing for the union, and if the facility unionized he would "just retire and close the shop." 228 NLRB at 184. The president then asked the employee "what he thought about that," and the employee answered it was the president's company and he could not tell him how to run it. *Id.*

Both cases dealt with a statement by an owner to shut down a plant and retire. To the extent it needs to be said, Fillmore could not shut down MBUSI's plant, did not threaten to shut

down the plant and did not threaten Garner with adverse consequences. Thus, those cases are, also, “easily distinguishable.”

4. The ALJ Appropriately Concluded Garner Indicated He Would Not Train Contractors.

The ALJ correctly found that Garner indicated he would not train the contractors. (ALJD, 2:33-35). CGC asserts, however, this is “in complete contradiction of the record.” (CGCB, p. 11). CGC is wrong.

The ALJ’s credibility determinations should not be disturbed. Fillmore credibly testified that Garner indicated that he was refusing to train the contractor workers, (*e.g.*, this was the “first” time an employee had “refus[ed]” one of his job duties (Fillmore, 97:16-19)) (Garner “express[ed] to me the fact that he wasn’t going to train...” (Fillmore, 96:15-23; RX-1)). Further, the surrounding circumstances clearly permit the reasonable inference that Garner was refusing to perform his training job duties, given his repeated statements of disdain for the contract workers and training them, that he did not want to train them, that he did not have to train them, and that MBUSI would be embarrassed because no one would train the contractors. (ALJD, 2:31-35, 3:2-7, 3:11-14; Fillmore, 30:4-20, 31:11-18, 33:19-34:2, 83:3-13, 84:15-86:3, 87:18-88:4, 96:15-23; Ivory, 111:11-17; Garner, 144:4-145:14; RX-1, RX-6). Likewise, Garner’s own testimony - “you all get embarrassed because no one wants them in here and doesn’t want to train them” - certainly permits the reasonable inference that he was asserting that he and others would not train the contractors (otherwise, why would MBUSI be “embarrassed?”). (Garner, 144:22-145:16).

Ultimately, CGC just did not like the ALJ’s finding or his bases for the determination. However, the record supports, as set forth in the ALJ’s decision, the credibility determinations and the reasonable inferences drawn therefrom. CGC has not shown that the ALJ’s determinations are incorrect by the clear preponderance of the evidence.

C. The ALJ Correctly Found That CGC Failed To Meet His Burden of Proof To Show MBUSI Unlawfully Interrogated Employees.

The ALJ correctly found that, based on his credibility determinations and the context, that Ivory did not unlawfully interrogate Team Members. (ALJD, 4:36-38). CGC's exceptions, however, seek a strange paradox that MBUSI inhibited protected rights when it - instead of exercising its lawful right to require that Team Members perform their training job duties under threat of discipline - gave Team Members the option decide if they wanted to train. Thus, it was, somehow, unlawful to ask Team Members about their willingness to perform a job duty they had no right to refuse to perform in the first place. Stated differently, it was unlawful to give Team Members *more* choices, *more* say and *more* freedom in their job duties. The ALJ rejected this nonsensical theory and concluded that MBUSI had a right to inquire if Team Members were willing to perform their training job duties after being told by Garner that no one would perform their training job duties. (ALJD, 4:37-5:5). The ALJ also concluded that, alternatively, if the *Rossmore House*, 269 NLRB 1176 (1984) interrogation factors (hereinafter referred to as the "Rossmore factors") applied, as CGC asserted, the alleged interrogation was not coercive. (*Id.*).

1. The ALJ Correctly Found MBUSI Could Ask If Team Members Would Be Willing To Train.

The ALJ properly concluded that, based on the context and his credibility determinations, MBUSI had a good, faith reasonable belief of an unprotected partial strike and it was not unlawful for MBUSI to make a non-threatening, one-time inquiry as to which employees would be willing to perform a critical job duty. CGC confusingly cites to *lawful* work stoppage cases¹¹ and a mix

¹¹ In *Holyoke Visiting Nurses Ass'n*, 313 NLRB 1040 (1994), employer sent a mailing asking employees intention to participate in a lawful strike organized by the union. Here, the partial strike contemplated was not lawful. Moreover, the ALJ found the employer did not assure the employees that no reprisals would be taken against them as a result of their response and refrain from otherwise creating a coercive atmosphere. Here, MBUSI "refrain[ed]" from otherwise creating a coercive atmosphere. Moreover, MBUSI fully explained the purpose of the inquiry in a non-threatening way and that employees did not have to train if they did not want to.

of interrogation cases analyzing the *Rossmore* factors¹² to argue the questioning was coercive. (cite 17, 18 and 20). However, the ALJ properly concluded the questioning was not coercive.

“The National Labor Relations Board has long held that it is well within the rights of employers to engage in discussions with their employees about the employees' inclinations or intentions to join a strike.” *G & H Prod., Inc. v. N.L.R.B.*, 714 F.2d 1397, 1400 (7th Cir. 1983) citing *Mosher Steel Co.*, 220 NLRB 336 (1975) and *Industrial Towel & Uniform Service Co.*, 172 NLRB 2254 (1968). While the ALJ did not specifically cite the above cases, he noted the cases dealing with employee refusals to work were more “apt” here. (ALJD, 4:15-16). *Preterm, Inc.*, 240 NLRB 654, 655, 674-75 (1979) (polling about a lawful work stoppage would be lawful where the purpose of the questioning was explained and it was not coercive); see, e.g., *Yesterday's Children*, 321 NLRB 766 (1996), enfd. in part and vacated in part 115 F.3d 36 (1st Cir. 1997)

¹² In *Cott Beverage*, 367 NLRB No. 97 (2019), no exceptions were taken to the ALJ's conclusion that the company violated Section 8(a)(1) by coercively interrogating its employees about protected concerted activity. Thus, the case has no precedential value. Moreover, the questioning related to a potential lawful work stoppage – as opposed to the unprotected partial strike here. Further, the evidence was “overwhelming” the questioning was intimidating and coercive. Certain employees were called away from their work station and required to give a statement about who started the work stoppage discussions and what everyone said, in what the ALJ described as an attempt to “flush out” the ringleader. Further, it was done under the specter of discipline (indeed, one employee had already been ejected from the facility and another said he did not want to get anyone “in trouble”). In contrast, here, the one-time question was not intimidating or coercive (and it was certainly not overwhelmingly so); employees were not isolated and required to reveal who started the discussions or what was said; and there was no risk of discipline and it was “non-coercive.” Moreover, the ALJ found the question did not have a valid work purpose (e.g., to establish who circulated the petition during work time in violation of the solicitation policy) whereas the ALJ here found as “important” that the question did have a valid, lawful purpose as MBUSI was concerned about meeting its work obligations.

In *Hyundai*, 366 NLRB No. 166 (August 20, 2018), the same ALJ who presided over this case found “that Respondent had a legitimate interest in finding out the circumstances under which Howard, Yarbrough, and Cleckler left work at 2 p.m.” The employer, however, was found to have engaged in interrogation because “there was no legitimate reason for Gomez to ask whether they had consulted each other, a question which delved into protected conduct” (here there was no such question), the interrogation took place in human resources office (not the situation here), the interview laid the groundwork for disciplinary action (not the case here) and two of three employees gave evasive answers (not the case here).

(finding no unlawful interrogation where, unaccompanied by threatening conduct, the employer asked an employee if she had heard a strike rumor).

“This general rule [employers right to engage in discussions with their employees about the employees' inclinations or intentions to join a strike] is especially true where the employer questions the employees about their intention to join a strike that he considers to be ‘wildcat’ in nature and illegal.” *G & H Prod., Inc.*, 714 F.2d at 1400 *citing Bankers Dispatch Corp.*, 233 NLRB 300 (1977). In *Bankers Dispatch Corp.*, the Board affirmed the ALJ’s finding that the employer lawfully called employees asking if they intended to report for work, after the company had been informed employees were talking about a possible wildcat strike. 233 NLRB at 300. The Board affirmed the ALJ’s finding that the employer had a legitimate interest “to make certain that [it] had a full crew to carry on the normal business,” the inquiry was not coercive, and the company explained the purpose of the call (“he had received word of talk regarding a wildcat strike”). *Id.* at 307.

Here, the ALJ found Garner and others had no right to refuse to perform their training job duties. Specifically, the ALJ explained “[i]t would not have been illegal for Ivory to tell employees that if they came to work, they would be required to train the temporary workers.” (ALJD, fn. 7). Further, the ALJ stated “a mass refusal to perform an assigned task could be an illegal partial strike.” (ALJD, fn. 4). And the ALJ was certainly correct. It is well settled that if employees report to work and expect to collect their pay they must perform their jobs rather than engage in a

"partial strike."¹³ A partial strike includes accepting some job tasks but refusing to perform others.¹⁴

The ALJ also found MBUSI had a legitimate, good-faith concern about a partial strike (ALJD, 2:33-36, 3:12-14) and its impact on MBUSI's ability to properly staff its business. (ALJD, 4:38-40, 5:1-2) (MBUSI was "unsure as to whether or not a sufficient number of Level 4 employees would be willing to train the temp workers" and MBUSI needed "to plan for the training of the temp workers."). As such, the ALJ determined it was clearly "reasonable" for MBUSI to ask which employees would be willing to perform their training job duties when it had a good faith concern that no employees would be willing to do so. Consistent with the above discussed legal authority, the ALJ found the inquiry was "non-coercive" (ALJD, 5:1-2) and MBUSI properly explained in the meeting that its purpose for the inquiry was solely to determine who was willing to train. (ALJD, 4:36-40). The inquiry was not unlawful.

Such a conclusion simply makes sense. It cannot seriously be argued that MBUSI was required to wait (and hope) that Team Members - who showed up to work and were receiving their full pay - would perform critical job duties that MBUSI needed them to perform to run its business. Indeed, MBUSI could have required the Team Members perform the training work or even discipline them for refusing to do so. Thus, it would be a strange paradox that giving Team

¹³ *Coastal Insulation Corp.*, 2009 WL 930052 ("[I]t is axiomatic under Board law that an employer is entitled to set the terms and conditions of employment of its work force.") (collecting cases); *Central Motors Corp.*, 269 NLRB 209; *Audubon Health Care Ctr.*, 268 NLRB at 137; *Daniel Constr. Co.*, 267 NLRB at 1221-22; *GAIU Local 13-B*, 682 F.2d at 308 ("Applying this rule, courts have uniformly held that a concerted refusal to perform overtime is an unprotected partial work stoppage.").

¹⁴ *N.L.R.B. v. McEver Eng'g, Inc.*, 784 F.2d 634 (5th Cir. 1986) ("Employee refusals to perform some established job duties are generally not deemed protected activities; such conduct is viewed as an attempt to dictate unilaterally the terms and conditions of employment. Thus an employee who continues to work, but refuses to obey the employer's orders to perform activities forming a legitimate part of his work, is considered to be conducting a partial strike and is not protected.") (collecting cases).

Members *more* choices, *more* say and *more* freedom than to which they would otherwise be entitled could inhibit their protected rights. That is, however, the nonsensical outcome CGC seeks.

2. Even Under The *Rossmore* Analysis, The Questioning Was Not Unlawful.

The ALJ specifically noted he would also consider the *Rossmore* factors because the “General Counsel briefed this case as an interrogation” case. (ALJD, 4:22). As discussed in MBUSI’s cross-exceptions, the “interrogation theory” was not raised until CGC’s post-hearing brief, and CGC cannot inject a new theory into a case via a post-hearing brief. (*See MBUSI’s Cross Exceptions*, filed 9/6/2019, p. 4-6). Regardless, the ALJ correctly articulated the *Rossmore* factors for determining whether a supervisor’s statement constitutes interrogation, specifically “[1] the background, [2] the nature of the information sought, [3] the identity of the questioner, [4] the place and method of interrogation, and [5] whether or not the employee being questioned is an open and active union supporter.” (ALJD, 4:22-34). The ALJ then correctly applied that standard to conclude that none of the factors were met.

Indeed, the Board can make quick work of all five factors. The “background” - whether the interrogation occurred against a background of other unfair labor practices - weighs in MBUSI’s favor as the ALJ found no unlawful acts. *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1223-24 (2002) (supervisor’s question “how many men were at the meeting last night” not unlawful and “background” factor weighted in employer’s favor because there were no other unlawful acts around that time and the company’s subsequent ULPs postdated the question at issue).

The type of "information sought" - whether the interrogator sought information on which to base taking adverse action against the individual employees - weighs in MBUSI’s favor as the ALJ found, and there is no contrary evidence, that Ivory was not seeking information to take action against the Team Members. (ALJD, 4:37-38, 5:1-2).

The third factor - whether the person asking the question was a high ranking official or a front-line supervisor - also favors MBUSI as Ivory was a front-line supervisor and had a good working relationship with Garner. (ALJD, 2:26-27; Ivory, 123:2-5). *Cardinal Home Prods., Inc.*, 338 NLRB 1004 (2003) (questioner was front-line supervisor rather than a "high-level manager" which weighed against unlawful interrogation); *Sunnyvale Med. Clinic*, 277 NLRB 1217, 1218 (1985) (finding manager's question to employee about why he joined the union to be non-coercive where manager and employee had a friendly and amicable relationship).

The fourth factor - the place and method of the questioning - favors MBUSI as the questioning took place in the open as part of a regular scheduled pre-shift team meeting in a team center where general work issues were discussed. (ALJD, 3:19-23; Ivory, 119:3-120:2). *U-Haul Co. of Cal.*, 347 NLRB 375, 375 (2006) (reversing ALJ and finding no interrogation because, among others, the statement about the union "occurred at one of the Respondent's plant meetings, where employees and managers periodically meet to discuss and exchange information on a wide range of issues, such as quotas, safety, attendance, production, and efficiency"), enfd., 255 F. App'x 527 (D.C. Cir. 2007). *See, e.g., Cardinal Home Prods., Inc.*, 338 NLRB 1004 (that conversation was informal on the plant floor rather than calling the employee away to the boss' office did not support finding of coercion); *Lewis Grocer Co.*, 282 NLRB 166, 166-68 (1986) (upholding the ALJ's finding the interrogation issue was asked in a break room, which was convincing evidence that the conversation did not have a coercive effect).

Finally, the fifth factor - whether or not the employee being questioned is an open and active union supporter - also weighs in MBUSI's favor as Garner certainly made the issue public (indeed, he discussed it with his supervisor and human resources) and specifically involved all his coworkers by repeatedly stating they *all* agreed with him and were not going to train. (ALJD, 2:33-

36, 3:2-7, 3:11-14, 3:30-32; Garner, 144:4-145:16). *U-Haul Co. of Cal.*, 347 NLRB at 376 (inquiry in front of 30 coworkers was not lawful because, in part, the inquiry arose "in response to Warren's public distribution of union literature concerning the union campaign in Las Vegas"). Thus, every *Rossmore* factor weighs in MBUSI's favor.

Faced with this reality, CGC focuses on one new factor allegedly articulated in *Hyundai Motor Manufacturing Alabama*, 366 NLRB No. 166 (August 20, 2018), an easily distinguishable case,¹⁵ which also considered as part of the *Rossmore* factor analysis whether the employees provided an "untruthful or evasive answer." While one factor certainly would not overcome the above discussed five factors weighing in MBUSI's favor,¹⁶ regardless, CGC is wrong. The ALJ found Garner answered the inquiry truthfully by raising his hand and indicating he did not wish to train. (ALJD, 3:19-23). The ALJ found Medders answered the inquiry truthfully by also raising his hand. (*Id.*). The ALJ noted the evidence establishes that the other eligible Team Members would have been willing to train. (ALJD, 3:23-24). Thus, they also provided a truthful response in the meeting (by not indicating they did not want to train).

¹⁵ In *Hyundai*, Judge Amchan found "that Respondent had a legitimate interest in finding out the circumstances under which Howard, Yarbrough, and Cleckler left work at 2 p.m." The employer, however, was found to have engaged in interrogation because "there was no legitimate reason for Gomez to ask whether they had consulted each other, a question which delved into protected conduct" (here there was no such question), the interrogation took place in human resources office (not the situation here), the interview laid the groundwork for disciplinary action (not the case here) and two of three employees gave evasive answers (not the case here). 2018 WL 3993748, at *5.

¹⁶ CGC also alleges the ALJ erred in making credibility determinations for this last factor. (CGCB, p. 20-21) CGC is simply not satisfied with the ALJ's finding. If the ALJ had credited CGC's witnesses he would have said so. Regardless, the five factors discussed above do not turn on CGC's challenges to the ALJ's credibility determination. And, for only factor CGC addresses, the ALJ found Garner and Medders answered truthfully and those who raised their hand did not want to train and have not and those who did not raise their hand were willing to train and have (*i.e.*, they answered truthfully as well).

CGC, who carries the burden, simply quibbles that McCullough and Thomas made evasive statements in the meeting.¹⁷ He recognizes, however, there is no evidence they gave “untruthful or evasive *answers*” as required in the *Hyundai* analysis.

Regardless, nothing they said was evasive. While CGC relies upon Garner’s claim that McCullough stated in the meeting "he didn't think Mr. Ivory should be doing it this way" (Garner, 138:4-9) (which the ALJ did not credit and which was not corroborated by the four other witnesses who testified (ALJD, 3:19-23; Ivory, 158:18-19; Thomas, 154:15-19; Kelly, 162:23-163:2; Benson, 166:11-24)), even if true this shows McCullough was willing to speak his mind in the meeting, the opposite of being evasive. And, the undisputed evidence is that McCullough told Ivory he was willing to train and did train and, thus, his act of not raising his hand was truthful and not evasive. (ALJD, 3:19-23; Ivory, 111:23-25, 112:9-25). Likewise, CGC contends Team Member Thomas testified that he "didn't want to participate in the meeting" but, Thomas contradicted this point (Thomas, 156:23-157:5) and even if credited, this makes clear Thomas was willing to speak his mind in the meeting, which (again) is the opposite of being evasive. Moreover, the undisputed evidence is that Thomas was willing to train and did train and, thus, his act of not raising his hand was truthful and not evasive. (ALJD, 3:19-24; Garner, 148:16-18). Indeed, Thomas, who was CGC’s witness, did not even testify he felt coerced in the meeting or that he was not truthful in responding. Ultimately, the evidence, which the ALJ credited, is that

¹⁷ CGC says Garner gave an evasive answer by denying he engaged in protected activity when he allegedly stated no Team Members wanted to train. (CGCB, p. 19). This is a curious position to take. Ivory denied Charging Party made this statement. (Ivory, 158:10-21). CGC's witness Thomas denied Charging Party made such a statement. (Thomas, 153:7-18). Witnesses Kelly and Benson denied Charging Party made any such statement. (Kelly, 163:6-8; Benson, 166:11-24). Thus, all witnesses dispute Charging Party's version of the events. Indeed, Charging Party even initially lied at hearing about making such a statement, then he told the truth. Charging Party initially testified that he "never told anybody in management that nobody wanted to train" the contractors, (Garner, 140:24-25), but, after being presented with his Board affidavit, admitted that was not true and that on August 10, 2018 he told Fillmore "I just want you to understand that we don't want to train them or want them in here," (Garner, 144:10-14), and then said "you all get embarrassed because no one wants them in here and doesn't want to train them." (Garner, 145:1-4).

those who raised their hand did not want to train and have not; those who did not raise their hand were willing to train and have.

As the ALJ's credibility determinations make clear, every single factor weighs in MBUSI's favor. MBUSI's non-coercive questioning of its employees simply sought to adduce information about unprotected behavior related to MBUSI's ability to conduct its business. As the ALJ concluded, the totality of the circumstances and Board authority demonstrate that there was nothing coercive.

IV. CONCLUSION

For the reasons articulated above, the ALJ's decision is clearly supported by the record and applicable Board law. CGC's Exceptions offer no reason to disturb these findings of fact or conclusions of law. Accordingly, MBUSI respectfully requests that the Board dismiss the Respondents' Exceptions, and adopt the ALJ's decision in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the NLRB via Electronic Filing, a copy has also been served via email and/or U.S. First-Class Mail on the following, on this the 6th day of September, 2019:

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