

**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 ANSWERING
RESPONDENT'S CROSS-EXCEPTIONS**

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I. INTRODUCTION

This brief is submitted in response to Respondent's Cross-Exceptions to the Administrative Law Judge's Decision in the instant case (JDD-61-19, issued July 26, 2019) ("ALJD").

Counsel for the General Counsel has alleged that Respondent Mercedes-Benz U.S. International, Inc. (MBUSI) (Respondent) threatened Charging Party Kirk Garner on August 10, 2018, and unlawfully polled or interrogated Respondent's employees regarding Garner's protected concerted activities on August 13, 2018.

Contrary to law and fact, the Administrative Law Judge found that Respondent's threats and polling/interrogation did not violate the National Labor Relations Act ("the Act"). Counsel for the General Counsel filed exceptions to the ALJD, along with a supporting brief, on August 23, 2019. On September 6, 2019, Respondent filed cross-exceptions to the ALJD, incorrectly arguing that (1) the judge should have applied *Boeing Co.*, 356 NLRB No. 154 (December 4, 2017), to the threat allegation, and (2) the judge incorrectly considered Board precedent on interrogations when analyzing the polling allegation in the complaint. Both of Respondent's cross-exceptions are without merit.

Respondent's Cross-Exceptions should be denied, as they are not supported by the record or Board precedent. As explained in Counsel for the General Counsel's exceptions and supporting brief, 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, and should find Respondent to be in violation of the Act and should order Respondent to cease and desist its unlawful conduct and to remedy its unlawful conduct.

II. ARGUMENT

A. Respondent's Cross-Exception 1: Unlawful threat or unlawful application of a rule?

1. The Board's decision in *Boeing* applies to rules, not threats.

In its decision in *Boeing*, the Board reassessed its standard for when maintenance of a work rule violates Section 8(a)(1) of the Act. Overturning the first prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board established a new standard that focused on the balance between the rule's negative impact on employees' ability to exercise their Section 7 rights and the rule's connection to employers' right to maintain discipline and productivity in their workplace. The Board in *Boeing* specifically noted that its decision only applies to the maintenance of facially neutral rules. *Boeing Co.*, 356 NLRB No. 154, slip op. at 8.

It is undisputed that the threat allegation in this case involves a one-on-one conversation between Charging Party Kirk Garner and Respondent's supervisor, Don Fillmore. Garner engaged in protected concerted activities by informing Fillmore that neither he or his coworkers wanted to train contractors. In response, Fillmore threatened Garner, stating, "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) There is no evidence or allegation in the record that Fillmore's statement was made in the presence of, or 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 constitute a rule promulgation, absent evidence the prohibition was repeated to other employees "as a general requirement." With no evidence in the record that Fillmore's threat to Garner was repeated to other employees "as a general requirement," this case does not involve a rule, *Boeing* does not apply, and Respondent's Cross-Exceptions

should be denied. See *Orchids Paper Products Co.*, 367 NLRB No. 33; see also *Boeing Co.*, 356 NLRB No. 154. For the reasons explained in Counsel for the General Counsel’s exceptions and supporting brief, the Board should find that Fillmore’s threat violated Section 8(a)(1) of the Act as alleged in the complaint.

2. Even if *Boeing* is applied to Fillmore’s threat, Respondent violated Section 8(a)(1) of the Act.

The Board in *Boeing* noted that rules that specifically ban protected concerted activity or that are promulgated directly in response to protected concerted activity remain unlawful. *Boeing Co.*, 356 NLRB No. 154, slip op. at 8; see also *Cordua Restaurants, Inc.*, 368 NLRB No. 43, slip op. at 3 (August 14, 2019). In *Cordua Restaurants*, the Board cited the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and validated a mandatory class-action waiver implemented by a company in response to the filing of a class action lawsuit by employees, but explained that the enforcement and/or promulgation of a non-procedural rule in response to protected concerted activity can still violate Section 8(a)(1) of the Act.

Fillmore threatened Garner in response to Garner’s protected concerted activities regarding the training of contractors.¹ Even if deemed a rule promulgation, Fillmore’s threat was levied in

¹ As explained in Counsel for the General Counsel’s Brief in Support of Exceptions, 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 the possibility of employees in the Quality department

direct response to protected concerted activity and, as such, was unlawful in violation of Section 8(a)(1) of the Act. See *Boeing Co.*, 356 NLRB No. 154, slip op. at 8.

3. Even if Fillmore’s threat is deemed an application of Respondent’s civility, teamwork, and work interference rules, Respondent has violated Section 8(a)(1) of the Act.

In its cross-exceptions, Respondent argues that Fillmore’s threat was “nothing more than the articulation of MBUSI’s lawful work rule principles of civility and teamwork and that illegal work interference is not permitted.”² (Respondent’s Cross-Exceptions (RCEX) at 3). However, even if Fillmore’s threat was an application of Respondent’s rules, Respondent applied those rules unlawfully to stop Garner’s protected concerted activities.

In *Boeing*, the Board held that the application of facially neutral rules against employees engaged in protected concerted activities is unlawful. *Id.* Fillmore threatened Garner in response to Garner’s protected concerted activities. Thus, even if Fillmore applied a neutral work rule, Respondent’s enforcement of that rule against Garner’s protected concerted activities violates Section 8(a)(1) of the Act. See *Id.*

being assigned to train contract workers involved conditions of employment and constituted protected concerted activity. See, e.g., *Circle K Corp.*, 305 NLRB 932, 933, *enfd.* Mem. 989 F.2d 498; *Vought Corp.*, 273 NLRB at fn. 28; *Spinoza, Inc.*, 199 NLRB 525, *enfd.* 478 F. 2d 1407.

² As noted in Counsel for the General Counsel’s Exceptions and supporting brief, Garner did not threaten a work stoppage, threaten to engage in any illegal work interference, or actually engage in any illegal work interference. Garner merely communicated with his co-workers and his supervisor regarding the Quality employees’ disinclination to train contractors, a task that Human Resources told Garner Quality employees would not be required to perform. (Tr. 93:10-14)

B. Respondent's Cross-Exception 2: Respondent's polling/interrogation violated the Act.

1. Polling is a type of unlawful interrogation.

In its second cross-exception, Respondent erroneously asserts that the judge should not have applied the Board's law relating to interrogation because Counsel for the General Counsel pleaded Supervisor Timothy Ivory's unlawful questioning about employees' protected concerted activities as "polling." Respondent goes further to assert that protected concerted activities cannot be the subject of unlawful polling unless the questioning concerns union sentiments. (RCEX at 4-6) As neither of Respondent's arguments is supported by Board precedent, this cross-exception should be denied.

Respondent and the judge err by relying on a false factual distinction between group interrogation and polling. In *Rhode Island PBS Foundation*, the Board affirmed an Administrative Law Judge's decision finding an employer violated the Act by polling employees regarding their union sentiments. In reaching this conclusion, the judge stated:

...what the Respondent did here was to conduct a poll, among a few employees, but it was a poll that lacked almost every procedural safeguard required by the Board. See, *Struckness Construction Co.*, 165 NLRB 1062 (1967). The Respondent does not claim that it conducted a lawful poll of employees. *To the extent (Respondent's) questioning is considered polling, it is plainly an unlawful interrogation...*

Rhode Island PBS Foundation, 368 NLRB No. 29, fn. 17 (August 5, 2019) (emphasis added). As explained in *Rhode Island PBS Foundation*, and affirmed by the Board, polling is interrogation. Therefore, the judge did not err in considering Board precedent on interrogations, and Respondent's cross-exception should be denied.

2. Polling does not require questioning concerning union sentiment.

Respondent also argues that it could not have unlawfully "polled" employees because it did not question employees about their union sentiments. (RCEX at 4-6). However, the Board

has long prohibited employers from coercively polling employees regarding their protected concerted activities, in addition to their union sentiments. See, e.g., *Perko's, Inc.*, 236 NLRB 884 (1978) (Board order specifically prohibited employer from polling its employees concerning “their involvement in union *or protected concerted activities.*” (emphasis added)). Therefore, Respondent’s Cross-Exception should be denied.

3. If the Board decides to distinguish polling from interrogation, it is still appropriate to consider whether Respondent’s actions constituted an unlawful “group interrogation” in violation of Section 8(a)(1) of the Act.

If the Board determines that a distinction exists between the legal elements of polling and interrogation, the ALJ nonetheless appropriately considered whether Ivory interrogated employees in violation of Section 8(a)(1) of the Act, as the issue of interrogation is closely connected to the subject matter of the complaint and was fully litigated.

In *Rhode Island PBS Foundation*, the judge found, and the Board affirmed, a polling allegation that had not been alleged in the complaint. As the judge explained, “it is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” *Rhode Island PBS Foundation*, 368 NLRB No. 29; citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2nd Cir. 1990).

The relevant subject matter of the complaint involves Respondent’s supervisor, Timothy Ivory, telling employees in a group meeting that employee Kirk Garner had informed Respondent that none of the employees wanted to train contract employees, then asking for a show of hands whether or not that was true. This issue has been fully litigated. Therefore, although the judge erred in his analysis and conclusions, the judge appropriately analyzed whether Respondent conducted an unlawful “group interrogation,” regardless of any distinction between polling and

interrogation. Respondent's Cross-Exceptions should be denied and, for the reasons stated in Counsel for the General Counsel's Exceptions and supporting brief, the Board should find that the actions of Respondent's Supervisor Ivory, described above, violated Section 8(a)(1) of the Act.

III. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel respectfully urges that the Board deny Respondent's Cross-Exceptions. Further, for the reasons explained in Counsel for the General Counsel's Exceptions and supporting brief, Counsel for the General Counsel respectfully urges the Board to reverse the Administrative Law Judge, 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. Alternatively, the Board should remand this case to the Administrative Law Judge with directions to consider the complete record, to apply the appropriate Board precedent, and to make any necessary credibility determinations.

Respectfully submitted this 21st day of
October, 2019,



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CERTIFICATE OF SERVICE

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