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I. INTRODUCTION

The Administrative Law Judge (ALJ) correctly found that the complaint allegations were meritless and dismissed the complaint in its entirety. Nevertheless, Mercedes-Benz U.S. International, Inc. (“MBUSI”) filed Cross-Exceptions, in an abundance of caution, to address two procedural aspects the ALJ failed to address in ruling in MBUSI’s favor. First, as set forth in MBUSI’s Cross-Exceptions, while the ALJ correctly ruled there was no unlawful threat, the ALJ merely needed to apply the work rule test from *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017) to determine the challenged statement was a facially valid work rule. In Counsel for the General Counsel’s (CGC) Answering Brief, he asserts *Boeing Co.*’s work rule analysis is not applicable to “one-on-one conversations” but he ignores that the *Boeing Co.* analysis does apply, even to one-on-one conversations, when a company is articulating a written work rule, as is the case here. CGC alternatively argues that, even if the work rule was facially valid under the *Boeing Co.* analysis, it was applied to interfere with protected, concerted activity but this ignores the *Boeing Co.* test and is nothing more than an improper and flawed challenge to the ALJ’s credibility determinations that Charging Party was not threatened and the challenged statement was not related to conduct protected under the Act.

Second, as set forth in MBUSI’s Cross-Exceptions, while the ALJ correctly concluded there was no unlawful polling or interrogation, the ALJ merely needed to determine MBUSI could not have engaged in “polling” because it did not inquire into employees’ union sentiment, and the ALJ should have rejected CGC’s attempt to inject an interrogation theory into the case via a post-hearing brief. In his Answering Brief, CGC cites no authority supporting an extension of a polling theory to inquiries that do not involve employees’ union sentiment; MBUSI is aware of none. CGC alternatively argues the interrogation theory first raised in his post-hearing brief should be considered because it was “closely connected” to the polling allegation but the two

separate causes of action are not closely connected, as the claims have different elements and defenses as recognized by Board precedent.

While the ALJ found MBUSI did not violate the Act, MBUSI's Cross-Exceptions show MBUSI did not violate the Act, but for additional and different reasons than those found by the ALJ, and CGC's Answering Brief fails to refute those reasons.

II. ARGUMENT

A. ***BOEING CO. CONTROLS AND ESTABLISHES THE CHALLENGED RULE WAS LAWFUL.***

As established in MBUSI's Cross-Exceptions, this case merely requires application of the *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017) analysis, which establishes work rules dealing with civility and work interference, such as the one here, are lawful. (RCEX at pg. 4).¹ CGC responds with two arguments: (1) he asserts the work rule here is outside the *Boeing Co.* analysis because the rule involved a "one-on-one conversation" and (2) the rule, even if facially valid under *Boeing Co.*, was applied to interfere with protected, concerted activity. (CGC Ans. at pgs. 4-5). CGC is wrong.

First, CGC argues a statement cannot be a "work rule" if it is only directed to one employee (*Id.*), and relies upon *Orchids Paper Products Co.*, 367 NLRB No. 33 (Nov. 20, 2018). In *Orchids Paper Products Co.*, a supervisor instructed one employee that he was prohibited from talking to employees in other departments about the union. 367 NLRB No. 33 at *3. The Board found the verbal statement was not a work rule promulgation because it was only communicated to one employee and was not the articulation of a "general requirement" communicated to other employees. *Id.* Similarly, the cases cited in *Orchids Paper Products Co.* also dealt with one-on-

¹ References to the ALJ's Decision ("ALJD") will appear as page number:line number. MBUSI's Cross-Exceptions will be cited as "RCEX". CGC's Answering Brief will be cited as "CGC Ans.".

one communications and not “general requirements” communicated to others. *See, e.g., Am. Fed’n of Teachers New Mexico*, 360 NLRB 438, 439 (2014) (oral promulgation of overbroad and discriminatory rules in one-on-one statements).

Here, the facts are different. While the exchange was a one-on-one conversation, MBUSI Supervisor Don Fillmore was articulating a “general requirement” set forth in MBUSI’s handbook. (MBUSI Post-Hrg. Brief at pg. 5). Because Fillmore was articulating established written policy in MBUSI’s handbook, he was not promulgating a new rule to one person, as was the supervisor in *Orchids Paper Products Co.* Thus, this case is distinguishable from *Orchids Paper Products Co.*

Second, CGC argues the rule was applied to inhibit protected, concerted activity, thereby removing it from the *Boeing Co.* analysis. (CGC Ans. at pgs. 5-6). CGC cites *Cordua Restaurants, Inc.*, 368 NLRB No. 43, at *3 (Aug. 14, 2019), which simply reinforced prior Board law that an employer cannot implement a valid rule for a discriminatory purpose. This case is not like *Cordua Restaurants, Inc.* for various reasons. As an initial matter, the work rule challenged here has long been in MBUSI’s handbook (MBUSI Post-Hrg. Brief at pg. 5; Fillmore, 53:11-14; RX-2); it was not “created” in response to protected, concerted activity, as was the case in *Cordua Restaurants, Inc.* More fundamental, contrary to CGC’s assertion the work rule here was not a threat and was not related to protected, concerted activity. Indeed, the ALJ flatly rejected both of CGC’s arguments. (ALJD, 3:35-36, 4:4-7). 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. (ALJD, 3:35-36, 4:4-7); *See also*, MBUSI Post-Hrg. Brief at pgs. 23-25). CGC’s argument that

there was a threat and that the threat was connected to protected, concerted activity is nothing more than a rehashing of ALJ credibility determinations with which CGC disagrees and CGC has provided no basis to overturn the ALJ's sound decision. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957) (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); *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996).

Thus, in addition to the ALJ's correct holding there was not an unlawful threat, the work rule allegation is due to be dismissed on the alternative basis that the Board's holding in *Boeing Co.* renders the challenged rule lawful.

B. CGC'S POLLING THEORY FAILS.

As established in MBUSI's Cross-Exceptions, CGC's polling theory fails because it is undisputed there was no inquiry into union sentiment. (RCEX at pgs. 4-6). CGC's Answering brief provides no legal or factual basis for the Board to do here what it has never done before: extend a "polling" cause of action to questioning that does not involve inquiry into employees' union sentiment.

While polling may take many forms², it is well settled that unlawful polling requires an inquiry into employees' union sentiment (*i.e.*, an observable choice as to whether the individual

² For example, a "union truth quiz" was held unlawful polling, *Sea Breeze Health Care Center, Inc.*, 331 NLRB 1131, 1132-33 (2000); distribution of anti-union paraphernalia in a manner that pressured employees to make an observable choice about the union was unlawful polling; *A. O. Smith Auto. Prods. Co.*, 315 NLRB 994 (1994); and requests to sign a written request for exclusion from an anti-union video was unlawful polling, *Allegheny Ludlum Corp.*, 333 NLRB 734 (2000), *enfd.*, 301 F.3d 167 (3d Cir. 2002).

supports the union).³ Indeed, never before has the Board found that inquiries into non-union protected concerted activity can constitute polling.

In response, CGC cites one case – for which he provides no substantive discussion – that, curiously, dealt with employer inquiries into *union sentiment* to support his argument that polling does not require an inquiry into union sentiment. (CGC Ans. at pg. 7). In *Rhode Island PBS Foundation*, 368 NLRB No. 29 (Aug. 5, 2019), the supervisor specifically asked employees about their union sentiments, or as CGC admitted: he “poll[ed] employees regarding their union sentiments.” (CGC Ans. at pg. 7). CGC, however, relies on an ALJ footnote that indicates unlawful questioning employees about their *union sentiment* can be polling *and* interrogation. (CGC Ans. at pg. 7). *Rhode Island PBS Foundation*, 368 NLRB No. 29, n.17. While questioning employees about their *union sentiment* can be polling and interrogation, the converse is not true and nowhere (including in *Rhode Island PBS Foundation*) has the Board held that interrogation into an employee’s non-union protected, concerted activities can be “polling.” Indeed, a polling cause of action has different elements⁴ and different defenses⁵ than interrogation into protected, concerted activities. CGC’s assertion, lacking any legal support or discussion, that alleged questioning into non-union activity is “polling” - and that interrogation and polling are interchangeable for pleading purposes - should be rejected and is not supported by *Rhode Island*

³ See e.g., *Space Needle, LLC*, 362 NLRB No. 11 (2015) (“Although polling may take many forms and occur in a variety of contexts, the essential harm in unlawful polling is that employees are forced to reveal their union sentiments to their employer without appropriate safeguards.”)

⁴ Polling deals with inquiries meant to determine union sentiment, while interrogation deals with whether a communication reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Southwire Co.*, 282 NLRB 916, 923 (1987).

⁵ A polling defense incorporates the five factor test from *Struksnes Constr. Co.*, 165 NLRB 1062, 1063 (1967), whereas the interrogation defense turns on the background, nature of information sought, identity of questioner, and place and method of interrogation. *Southwire Co.*, 282 NLRB 916, 923 (1987).

PBS Foundation or any other legal authority. *HTH Corp.*, 356 NLRB 1397, 1407 (2011) (finding unlawful polling, but refusing to consider interrogation because it was not properly pled); *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1361 (D.C. Cir. 1997) (remanding to the Board for failure to make proper distinction between interrogation and polling). Because there was no inquiry into union sentiment, and because the Board has never found that inquiries into non-union protected concerted activity can constitute polling, CGC’s polling theory fails as a matter of law.

C. THE NEW INTERROGATION THEORY IS TOO LATE.

Because CGC only pled a polling theory which is deficient on its face, that allegation is due to be dismissed. However, CGC has now pivoted, arguing he should be permitted to raise a new interrogation theory. He is wrong.

As set out in MBUSI’s Cross-Exceptions, in the amended unfair labor practice charges, the complaint and at the hearing, CGC only asserted an unlawful polling allegation. (RCEX at pgs. 4-6, see GCX 1(c), 1(e) 1(g)). It was only until CGC’s post-hearing brief that he injected, for the first time, an unlawful interrogation theory. (CGC Post-Hearing Brief at pgs. 18-19).⁶ He now asserts that he should be permitted to inject an interrogation theory into the proceeding via his post-hearing brief because the interrogation allegation “is closely connected to the subject matter of the complaint and was fully litigated.” (CGC Ans. at pg. 8).

However, the Board has recognized the difference between pleading polling and interrogation and has required that CGC plead both polling and interrogation, if CGC intends to assert both theories. For example, in *HTH Corp.*, 356 NLRB 1397, 1407 (2011), the employer’s Human Resources department conducted polls of 63 employees concerning their union sympathies

⁶ <https://www.nlr.gov/case/10-CA-226249>

and desires. While CGC pled polling, he did not plead interrogation. The ALJ found the questioning unlawful polling, and also stated “it qualifies as straightforward coercive interrogation concerning the employees' union sympathies, activities and desires.” *Id.* at 1423. However, the Board disagreed. It affirmed the polling finding but rejected the interrogation finding, stating “[a]lthough we agree that the Respondents unlawfully polled their employees, we do not find unlawful interrogation.” *Id.* at 1398 n.6. The Board recognized that the same communication was at issue but refused to consider the lawfulness of the communication because the “[interrogation allegation] was not pleaded in the complaint.”⁷ *Id.* (*emphasis added*); *see also Ridgewood Health Care Ctr., Inc.*, 367 NLRB No. 110, 2019 WL 142575, at *12 n.18 (Apr. 2, 2019) (reversing administrative law judge, and holding perfectly clear successor theory was not properly pled in case alleging successorship because the perfectly clear successor theory was “[n]either [in] the complaint nor any of the underlying charges” and “[t]he General Counsel did not present argument in support of this theory of violation until his post-hearing brief”). Even more, *HTH Corp.* dealt with similar theories -questioning of *union sentiment* can be polling and interrogation - and yet they still were not sufficiently “closely connected”, whereas here there is even less of a connection because, as discussed above, polling is fundamentally different from interrogation into non-union protected concerted activity.

CGC’s only case in support of his theory that pleading a polling theory is sufficiently “closely related” to an interrogation theory is *Rhode Island PBS Foundation*, which is easily distinguishable. In *Rhode Island PBS Foundation*, the ALJ did not find he could consider an interrogation theory where the CGC had only pled a polling theory. 368 NLRB No. 29 at 11.

⁷ The Board also noted that finding another Section 8(a)(1) violation related to the same conduct would be cumulative of the polling violation and would not affect the remedy.

Instead, CGC neither pled polling nor interrogation, but the ALJ considered the legality of employer's questioning of employee's union support because the employer had injected the issue into the lawsuit and there were no due process concerns with the ALJ stating "[t]here is no issue of due process as the Respondent independently, and purposely, raised the entire subject for its own purposes." *Id.*⁸ Further, the CGC sought to amend the complaint, which the ALJ indicated he would have allowed had he not already ruled he could properly consider the legality of the questioning. *Id.* at n. 18. Nowhere does the ALJ consider, let alone discuss, whether pleading a polling theory permits a CGC to assert after trial an interrogation theory. And, here, unlike *Rhode Island Foundation*, there are fundamental due process concerns raised by CGC's new interrogation theory.

CGC cannot inject his new interrogation theory into this case via a post-hearing brief and the ALJ should have dismissed the new "interrogation" theory for this reason alone.

III. CONCLUSION

The ALJ correctly found that the complaint allegations were meritless and dismissed the complaint in its entirety. While the CGC has taken exceptions, those exceptions are meritless and, as the ALJ determined, the complaint is due to be dismissed. However, in an abundance of caution, MBUSI filed cross-exceptions which also show MBUSI did not violate the Act, but for additional and different reasons than those found by the ALJ, and the CGC's Answering brief fails to refute those reasons.

⁸ Specifically, the employer argued as a defense to the 8(a)(5) bargaining violations alleged by CGC that it withdrew union recognition based on responses it received from questioning employees about their union support and, thus, injected its questioning of employees' union support into the litigation. *Rhode Island PBS Foundation*, 368 NLRB No. 29 at 11.

/s/ Marcel L. Debruge

Marcel L. Debruge
Michael L. Lucas
Matthew T. Scully
Attorneys for Respondent
Mercedes-Benz U.S. International, Inc.

OF COUNSEL:

BURR & FORMAN LLP
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100

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 4th day of November, 2019:

John D. Doyle, Jr.
Regional Director
National Labor Relations Board
Region 10
233 Peachtree NE
Harris Tower, Suite 1000
Atlanta, GA 30303-1504
Email: John.Doyle@nlrb.gov

Joseph Webb
National Labor Relations Board
1130 South 22nd Street
Suite 3400
Birmingham, AL 35205-2870
Email: Joseph.Webb@nlrb.gov

Kirk Garner
P.O. Box 122
Duncanville, AL 35456
Email: kgarner724@aol.com
kgarner724@gmail.com

/s/ Marcel L. Debruge

OF COUNSEL