**Mercedes-Benz U.S. International, Inc. (MBUSI) *and* Michael Kirk Garner.** Case 10–CA–226249

March 3, 2020

## DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On July 26, 2019, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. In addition, the Respondent filed cross-exceptions with supporting argument, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. March 3, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Joseph W. Webb, Esq.,* for the General Counsel.
*Marcel L. Debruge* and *Michael L. Lucas, Esqs. (Burr Forman, LLP),* of Birmingham, Alabama, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, ADMINISTRATIVE LAW JUDGE. This case was tried in Birmingham, Alabama, on June 19, 2019. Michael Kirk Garner (hereinafter referred to as Kirk Garner) filed the initial charge on August 24, 2018, and then filed two amended charges. The General Counsel issued the complaint on March 12, 2019.

The General Counsel alleges that on August 10, 2018, Respondent Mercedes-Benz, by Supervisor Don Fillmore, violated Section 8(a)(1) of the Act by threatening Kirk Garner with unspecified reprisals when Fillmore told Garner not to get his work group stirred up over the issue of training contract employees. He also alleges that Respondent, by Supervisor Timothy Ivory, violated Section 8(a)(1) on August 13, 2018, by polling employees as to whether they agreed with Garner's objection to training contract employees in their department.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a corporation, manufactures and sells automobiles at its facility in Vance, Alabama, where it annually sells goods valued in excess of $50,000 directly to points outside of Alabama. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

In August 2018, Respondent was preparing to launch a new vehicle model. As part of that launch it decided to hire temporary contract workers in the GFP quality department. This department performs that last quality inspection of automobiles before they leave the plant for sale to dealerships. The GFP department works three shifts, A, B, and C. A and B shift rotate every 2 weeks between mornings and afternoons. C shift, the night shift, does not rotate. Each shift in the GFP department consists of 15–17 employees and is split into two groups; the static group, which, for example, tests the torque on bolts and the dynamic group which test drives cars. The GFP department tests about 5 percent of the cars leaving the assembly area; other quality tests are performed before vehicles get to GFP.

Don Fillmore is the Group Leader of the B shift; Timothy Ivory is the Group Leader of the A shift. Respondent admits that in August 2018 they were statutory supervisors and agents of Mercedes-Benz. There is no group leader present in the plant during the C shift. This shift is managed by Fillmore and Ivory jointly.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Because we adopt the judge's dismissal of the allegation that the Respondent unlawfully interrogated employees, we find the Respondent's cross-exception, contending that the allegation was not fully litigated, is moot.

On August 7, 2018, Fillmore informed GFP employees that Respondent would be hiring temporary contract employees and that the more experienced "level 4" employees would train these contract employees. Kirk Garner, a level 4 employee on the C shift, went to Respondent's human resources department and announced that he did not want to train these employees.[1] A human resources representative told Garner that he did not have to do so. Garner had spoken to some co-workers about this before going to human resources. Several were unhappy about Respondent asking them to train the temps.

On August 9, at the changeover between the B and C shifts, Garner approached Fillmore and told him that neither he nor any other employee wanted to train the contract employees and that "we" didn't want them at the plant. Fillmore said no other team member had told him they didn't want to train the temps and that Garner could only speak for himself. He also asked Garner if he wanted to speak to human resources about this. Garner told Fillmore that he had already done so and had been told that he did not have to train the contract employees. Fillmore told Garner that he would verify that and if that were so, he'd abide by human resources' decision.[2]

Garner spoke to Fillmore again the next day. He reiterated that he and other employees did not want to train the contract employees and did not want them in the department. Garner told Fillmore that he (or the company) would be embarrassed because nobody wanted to train the contract employees. Fillmore responded, "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 its's going to take everyone to do it."[3]

Fillmore told Ivory, Group Leader on the A shift, about his conversation with Garner. At a preshift meeting with the C shift on August 13, Ivory told the 15–17 employees present that he'd been told that Garner had said that nobody wanted to train the contract employees. He asked for a show of hands as to whether or not that was true. Two employees, Garner and Kylie Meddor raised their hands—indicating that they did not want to train the contract employees. The meeting ended and C shift went to work. Apparently, most of the C shift level 4 employees trained the temporary workers as requested.

*Conclusions and Analysis*

The alleged threat

Respondent's human resources department had advised Garner that he did not have to train the temp workers if he didn't want to do so before Garner spoke to Fillmore. Fillmore did not hint at any adverse consequences if Garner continued to refuse to perform this training. Moreover, 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. Fillmore also did not threaten Garner with any adverse consequences if Garner encouraged other employees to opt out of the training.

It is unclear what one objectively would understand, "that will not help or be good for anyone" means in this context. It could be reasonably understood to mean a lot of things particularly since this statement was made in response to Garner's statement that Respondent would be embarrassed if it brought the temp workers into GFP. Garner could have reasonably interpreted this to mean nothing more than he would be making Fillmore's life more difficult and/or that a mass refusal to train the temps would make them feel unwelcome and/or that it would make it significantly more difficult to train the temps so that they could adequately perform their tasks. The comment does not necessarily suggest 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.[4] I find that Fillmore did not interfere with, coerce, and restrain Garner in the exercise of his Section 7 rights.[5]

The allegedly illegal poll

The lead case on "polling" is *Struksnes Construction Co.*, 165 NLRB 1062 (1967). However, that case dealt specifically with a poll conducted to determine the truth of a union's claim to represent a majority of unit employees. Thus, *Struksnes* is not controlling in this case. More apt to this case is the Board's decision in *Preterm, Inc.,* 240 NLRB 654, 655, 674–75 (1979). In that case the Board found it was not illegal for a healthcare institution to send employees a questionnaire asking them if they intended to strike. The questionnaire explained that Respondent wanted the answers to plan for incoming patients. It also stated that there would be no reprisals against employees who replied that they would not show up for work on the first day of the strike.[6]

The General Counsel briefed this case as an *interrogation* rather than a *polling* case. Thus, I believe the general test to be applied in this case is *Rossmore House,* 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Pursuant to the *Rossmore* test,

[1] At p. 4 of his brief, the General Counsel states that the UAW has been engaged in an organizing campaign at the Vance plant for 2 decades and that the Board found that Respondent violated Sec. 8(a)(1) in 2014. This is not mentioned in the record of this case. However, I take judicial notice of the Board's decision at 361 NLRB 1028 (2014) which was remanded at 838 F. 3d 1128 (11th Cir. 2016). This case ended up in a formal settlement in which Respondent agreed that it violated the Act in prohibiting union literature distribution in the team center located between C-01 and F1-18 (the Gilbert Team Center) in Assembly 2 during the time immediately before the preshift meeting and during designated breaks by employees who are not on working time. According to these decisions, Garner is an in-house leader of the organizing drive and filed at least some of the charges giving rise to the prior case. However, I find that all of the above is irrelevant to the disposition of this case.

[2] There is conflicting and confusing testimony as to whether Garner had spoken to human resources prior to this conversation and when Fillmore became aware that Garner had been told by HR that he did not have to do the training. I find that Garner had received permission from HR to opt out of the training before he spoke to Fillmore and that he told Fillmore that on August 9.

[3] Garner's testimony is that Fillmore said, "don't get the group started up over this issue." I do not see any material difference in their accounts.

[4] As Respondent points out, a mass refusal to perform an assigned task could be an illegal partial strike.

[5] The cases cited by the General Counsel are easily distinguishable. The admonitions in those cases were accompanied by explicit threats.

[6] The Board found a 8(a)(1) violation in that the employer later verbally threatened two employees with termination if they decided to strike.

> [I]t is [well established] that interrogations of employees are not per se unlawful but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act."

In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter, *Norton Audubon Hospital,* 338 NLRB 320, 320–321 (2002).

I view Ivory's asking for a show of hands to be a group interrogation, as well as, or instead of, a "poll." Given the lack of a threat and the need for Respondent to plan for the training of the temp workers, I find Respondent, by Ivory, did not violate the Act. It is particularly important to note that Ivory, a first line supervisor, was at least unsure as to whether or not a sufficient number of level 4 employees would be willing to train the temp workers. Thus, I find that it was reasonable and non-coercive for him to inquire as to whether Respondent had to come up with an alternate plan to accomplish this training.[7] Since there is normally no group leader present on C shift a mass refusal to train the temps might have required Respondent to assign a group leader (possibly Fillmore and/or Ivory) to that shift while the temp workers were present.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 26, 2019

[7] It 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.

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