

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**TESLA, INC.**

and

**MICHAEL SANCHEZ, an Individual**

and

**JONATHAN GALESCU, an Individual**

and

**RICHARD ORTIZ, an Individual**

and

**INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS OF  
AMERICA, AFL-CIO**

**Cases 32-CA-197020  
32-CA-197058  
32-CA-197091  
32-CA-197197  
32-CA-200530  
32-CA-208614  
32-CA-210879  
32-CA-220777**

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REPLY TO RESPONDENT'S OPPOSITION TO THE GENERAL COUNSEL'S  
LIMITED CROSS-EXCEPTIONS - CORRECTED**

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## **I. INTRODUCTION**

On September 27, 2019, the Administrative Law Judge (ALJ) in this matter correctly concluded that Respondent committed widespread violations of the Act in order to interfere with and discourage employees from engaging in Union and protected concerted activities. The Counsel for the General Counsel has filed very limited cross-exceptions. As amended, they are: 1) the ALJ erred by not finding that Respondent's rule prohibiting employees from speaking with the media is unlawful under *Boeing*, and 2) certain remedies in the ALJ's decision (ALJD) were inadvertently omitted while others require a broader scope in order to adequately remedy the unfair labor practices Respondent committed.

## **II. RESPONDENT'S MEDIA RULE VIOLATES SECTION 8(A)(1) OF THE ACT UNDER *BOEING***

Respondent argues it is lawful to restrict its employees from communicating with the media or someone closely related to the media about Tesla, without prior approval, because employees would reasonably understand that the blanket ban only applies to proprietary information because it is found inside its Confidentiality Agreement. It also argues that the rule merely prohibits employees from speaking to the media on behalf of the company as its spokesperson. Such arguments might be convincing if one simply ignores the plain meaning of the words that describe the rule.

When the plain meaning of the rule is not ignored, but rather read within the context of the Confidentiality Agreement, it is reasonable to conclude that employees would understand that the ban is far broader than refraining from speaking to the media about

confidential proprietary information or that it is preventing employees from acting as unauthorized spokespeople.

The Confidentiality Agreement states,

In response to recent leaks of confidential Tesla information, we are reminding everyone who works at Tesla, whether full-time, temporary or via contract, of their confidentiality obligations and asking them to reaffirm their commitment to honor them.

These obligations are straightforward. Provided that it's not already public information, everything that you work on, learn about or observe in you[r] work about Tesla is confidential information under the agreement that you signed when you first started. This includes information about products and features, pricing, customers, suppliers, employees, financial information, and anything similar. **Additionally, regardless of whether information has already been made public, it is never OK to communicate with the media or someone closely related to the media about Tesla, unless you have been specifically authorized in writing to do so.**

Unless otherwise allowed by law or you have received written approval, you must not, for example, discuss confidential information with anyone outside of Tesla, take or post photos or make video or audio recordings inside Tesla facilities, forward work emails outside of Tesla or to a personal email account, or write about our work in any social media, blog, or book. If you are unsure, check with your manager, HR, or Legal. Of course, these obligations are not intended to limit proper communications with government agencies.

The consequences of careless violation of the confidentiality agreement, could include, depending on severity, loss of employment. Anyone engaging in intentional violations of the confidentiality agreement will be held liable for all the harm and damage that is caused to the company, with possible criminal prosecution. These obligations remain in place even if no longer working at Tesla.

By acknowledging, I affirm my agreement to comply with my confidentiality obligations to Tesla. I also represent that at no time over the past 12 months have I disclosed any Tesla confidential information outside of Tesla unless properly authorized to do so. (R Exh.11; ALJD 10:46-11:38) (media rule at issue bolded for the purposes of this Reply Brief)

**1. A Reasonable Employee Would Not Ignore The Plain Meaning Of Respondent's Media Rule Which Expressly Prohibits Them From Speaking With The Media Without Prior Authorization**

While the media ban is located within the Confidentiality Agreement -- it is a separate prohibition. It expressly prohibits employees from speaking with the media or anyone closely related to the media "regardless of whether information has already been made public." The maintenance of such rule violates Section 8(a)(1) of the Act under the framework set forth in *Boeing Co.*, 365 NLRB No. 154 (2017). While Respondent attempts to cast the rule as a Category 1 or 2 rule because it is located within the Confidentiality Agreement that states that there have been leaks of confidential information, such a conclusion would require a reasonable employee to ignore the plain meaning of the actual words that constitute the media rule. While the General Counsel understands that rules should not be read in isolation, that principle does not permit one to simply ignore the plain meaning of the actual language. In this case, the plain meaning of the media rule must be understood within the context of the surrounding language of the Confidentiality Agreement and not the subjective intent of the drafter.

First, the media rule, which is in the second paragraph of the Confidentiality Agreement, starts off with "Additionally." The word "additionally" ordinarily tells the reader that the subsequent sentence (i.e. information) is something *additional* to what has already been stated, or in this case, prohibited, which is the leaking of confidential information as described in the first paragraph and the litany of subjects listed in the second paragraph and "anything similar." (R Exh.11)

Next, the rule states that “regardless of whether information has already been made public,” which ordinarily means information that is public. (R Exh.11) However, Respondent contends that a reasonable employee should understand that the sentence is actually limited to confidential proprietary information that has already been leaked. The plain meaning of “information,” “already been made public,” far exceeds confidential proprietary information that has been leaked. Together, with “Additionally . . .” “regardless of whether the information has already been made public . . .” and “it is never OK . . .” it is not reasonable to conclude that an employee would understand the media ban is only referencing previously leaked proprietary information, especially when the preceding sentence in that same paragraph states that confidential information does not include information “already made public.” (R Exh.11)

The rule then goes on to state, “it’s never OK to communicate with the media or someone closely related to the media about Tesla, unless you have been specifically authorized in writing to do so.” (R Exh.11) This is a sweeping pre-authorization requirement. The rule prohibits communication not only with the media but also “someone closely related to the media” which includes anyone that may be married to, intimate with, or biologically or adoption or otherwise “related to” someone that is in the media or works in the media, without prior authorization. (R Exh.11) It is well-established that a pre-authorization requirement that compels an employee to seek authorization from an employer before engaging in protected activities violates the Act. *DirectTV*, 359 NLRB 545, 546, n. 7 (2013), vacated by *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) but subsequently re-adopted by the Board in *DirectTV*, 362 NLRB No. 48 (2015); *Brunswick*

*Corp.*, 282 NLRB 794 (1987). Here, an employee must seek prior authorization before speaking with someone about Tesla whom they suspect might be “closely related” to the media. Such a requirement is so vague and broad that it prevents employees from speaking to any individual that may be perceived to have a connection to the media, even about public information that they may have learned while working for Respondent, without prior authorization.

In sum, based on the plain meaning of Respondent’s media policy, when read within the context of the Confidentiality Agreement as a whole, the media rule expressly prohibits employees from speaking to the media or someone closely related to the media about anything related to Tesla regardless of whether the information is public, without prior permission. Such an all-encompassing express prohibition, coupled with a preauthorization requirement, violates Section 8(a)(1) of the Act and is a Category 3 rule.

**2. Respondent’s Media Rule Does Not Contain A Broad Savings Clause Like In *National Indemnity* And It Is Not Prohibiting Employees From Speaking “On Behalf” Of The Company Like In *LA Specialty***

Respondent argues that the media rule is a Category 1 or 2 rule because the ALJ found the entire Confidentiality Agreement to be limited to proprietary information. (ALJD 11:25-27) While the ALJD may have referenced the media rule generically through the heading as “paragraph 7(a)” of the Complaint (ALJD 10:20),<sup>1</sup> there is no reference to the media rule other than the rule itself and noting that the Complaint alleges a

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<sup>1</sup> The media rule at issue is alleged in Paragraph 7(a)(ii) of the of the Second Amended Consolidated Complaint that issued on March 30, 2018 (GC Exh. 1(jj)) in this matter.

preauthorization requirement in the Confidentiality Agreement. (ALJD 10:33) There is no explicit analysis of the media rule in the decision. (ALJD 10:20-15:14) In the portion of the analysis where the ALJ makes the point that she will not read the Confidentiality Rule in isolation, she does not mention the media rule even while referencing other portions of the Confidentiality Agreement such as the prohibition on having discussions with other employees or third parties like a union or “discussion of confidential information which could include working conditions, the taking or posting of photos, making videos or audio recordings, forwarding work email or writing about their employment without receiving permission.” (ALJD 13:40-14:11)

If the ALJ had analyzed the media rule, she could have noted the absence of a savings clause like in *National Indemnity*, 368 NLRB No. 96 (2019). The revised confidentiality rule in *National Indemnity* states, among other things, that the rule does not apply to “wages, benefits, hours, or other terms and conditions of employment.”<sup>2</sup> While such a specific savings clause may not have been necessary in this case given the context of the media rule within the Confidentiality Agreement, Respondent needed other language to signal some type of limitation or reference back to proprietary information with respect to the media rule. Rather, it intentionally used expansive language which

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<sup>2</sup> The Board specifically noted that the revised version of the Confidentiality Agreement “added language specifically informing employees that ‘nothing in this Confidentiality Agreement’ prohibits them from discussing ‘wages, benefits, hours, or other terms and conditions of employment,’ and further stating that ‘[e]mployees have the right to engage in or refrain from engaging in such activities to the extent protected by law,’” which was a factor for why it did not require a rescission of the prior version. *National Indemnity*, 368 NLRB No. 96 at p. 2 (2019).

plainly signals the exact opposite, such as “Additionally,” “regardless of” and “it is never OK.”

Also, unlike the media rule found in *LA Specialty*, 368 NLRB No. 93 (2019), Respondent’s media rule is not prohibiting employees from acting as a company spokesperson without prior authorization. Rather, employees are told “it is never OK to communicate with the media or someone closely related to the media about Tesla, unless you have been specifically authorized in writing to do so.” Simply, it states that an employee needs prior authorization before it can ever speak to the media or even someone closely related to the media. Nothing in the rule suggests it is about preventing employees from speaking “on behalf” of the company or acting as a company spokesperson without authorization like in *LA Specialty’s*.

### **III. A NATIONWIDE RESCISSION ORDER TO REMEDY MUSK’S UNLAWFUL THREAT BY TWITTER IS JUST AND PROPER GIVEN THE SCOPE AND IMPACT OF THE THREAT**

It is just and proper for the Board to require a nationwide remedy for the unlawful tweet heard around the world. While the other violations were limited to the Fremont facility, the unlawful tweet not only interfered with the Section 7 rights of Respondent’s employees but all other statutory employees who read the tweet. The General Counsel is not requesting that the Notice to Employees for all other violations be posted beyond the Fremont facility. Rather, the limited request is with respect to remedying the unlawful tweet.

Similarly, it is just and proper for the Board to order a rescission remedy with respect to the tweet. While Respondent argues that requiring deletion of a tweet is novel,

rescission remedies are commonplace. It is a traditional remedy that is ordered in many types of violations including Section 8(a)(1),(3), and (5) violations.<sup>3</sup>

A rescission remedy is required here because the unlawful threat was made through Musk's Twitter account, where he has at least 23 million followers worldwide. (Joint Exh. 4)<sup>4</sup> As a prominent public figure, the impact of his unlawful tweet is big and far reaching. Therefore, ordering Respondent to request Musk to delete the tweet is proportionate to the scope of the violation.

Moreover, rescission is not an onerous affirmative act, and therefore, the balance of hardship tips in General Counsel's favor. While Respondent attempts to third-party Musk by distinguishing his Twitter account from Respondent's account, Musk is not an ordinary third-party. He is the founder and CEO of Respondent. It would not be difficult for Respondent to locate him to request that he delete his tweet. Rescission is also very cost-effective as it costs nothing to delete a tweet. Lastly, it is not punitive as a tweet can be deleted without any observers, nor does it require Musk to admit guilt, express remorse, or face public humiliation in any way.

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<sup>3</sup> See *Core Recoveries LLC*, 367 NLRB No. 140 (2020)(Board ordered rescission of a work rule that violated Section 8(a)(1) of the Act and to notify all impacted employees that it has been rescinded); *National Indemnity Co.* 368 NLRB No. 96 (2019)(Board ordered rescission of an unlawful memo); *Richfield Hospitality, Inc.*, 368 NLRB No. 44 (2019)(Board ordered rescission of unilateral changes made to remedy Section 8(a)(5) violation and ordered Respondent to remove all references to unlawful termination in personnel files as a remedy to a Section 8(a)(3) violation.)

<sup>4</sup> As of today, <https://livecounts.net/twitter/elonmusk> shows that Musk has over 32 million followers.

In sum, it is just and proper for the Board, within its authority, to require rescission of the tweet. It is the only way to adequately address the scope and impact of the threat. The alternative is to allow the threat to continue its unlawful effect in perpetuity.

#### **IV. CONCLUSION**

For the reasons stated above, it is respectfully requested that the Board find that Respondent's maintenance of its media rule violates Section 8(a)(1) of the Act. Further, that it orders a limited nationwide remedy with respect to the unlawful tweet including rescission by deletion, as well as all other remedies recommended by the ALJ subject to the corrections requested in the General Counsel's Limited Cross-Exceptions.

**DATED AT** Oakland, California this 19th day of March 2020.

/s/ Christy Kwon

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**Date: March 19, 2020**

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S  
REPLY TO RESPONDENT'S OPPOSITION TO THE GENERAL  
COUNSEL'S LIMITED CROSS-EXCEPTIONS - CORRECTED**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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