

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO DIVISION OF JUDGES**

**HARBOR FREIGHT TOOLS USA, INC.**

**and**

**Case 28-CA-232596**

**DANIEL RUIZ SR., an Individual**

**GENERAL COUNSEL'S POST-HEARING BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,

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**I. STATEMENT OF THE CASE**

This case was heard before Administrative Law Judge Gerald Etchingham (the ALJ) on March 10, 2020 pursuant to a Complaint and Notice of Hearing (the Complaint) that issued on January 22, 2020. GCX 1(c).<sup>1</sup> The Complaint is based on a charge filed by Daniel Ruiz, Sr. (the Charging Party) on December 12, 2018. GCX 1(a). The Complaint alleges that Harbor Freight Tools, USA Inc. (the Respondent) violated Section 8(a)(1) of the Act by maintaining three overly-broad and discriminatory rules in its Employee Handbook: a Proprietary and Confidential Information rule, a Solicitation and/or Distribution rule, and a Social Media and Networking Guidelines rule (collectively the Rules).<sup>2</sup> GCX 1(c); GCX 2 at 17, 18, 35-36. On February 11, 2020, Respondent filed its Answer to Complaint and Notice of Hearing (the Answer)<sup>3</sup> admitting it maintained the Rules in its Employee Handbook. GCX 1(g) at page 1-2.

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<sup>1</sup> GCX\_\_\_ refers to General Counsel’s Exhibit followed by the exhibit number; RX\_\_\_ refers to Respondent’s Exhibit followed by exhibit number; “Tr. \_:\_\_\_” refers to transcript page followed by line or lines of the transcript of the unfair labor practice hearing.

<sup>2</sup> At the hearing, the ALJ, without objection from Respondent, granted Counsel for the General Counsel’s motion to amend paragraph 4 of the Complaint to allege that Respondent has maintained the Rules in its Employee Handbook “[s]ince at least April 20, 2019, through about January 20, 2020.”

<sup>3</sup> The ALJ should deny Respondent’s unsupported request for attorneys’ fees and costs. See 28 USC § 2412.

## **II. STATEMENT OF THE FACTS**

### **A. Background**

Respondent is engaged in the business of the retail sale of tools and operates at least 1,000 facilities across 48 states, employing at least 20,000 employees. GCX 3; Tr. 23:12-24:11. Its retail stores have sales floors, stock areas in the back with attached loading docks for trucks, and bathrooms that are open to the public. Employees also perform work outside the store, including collecting carts in parking lots, conducting sales up to six times a year in parking lots, unloading trucks in the loading docks, and advertising and selling products on the sidewalks in front of the store. Tr. 63:15-64:22; 77:8-11.

Respondent's distribution centers are massive, with at least 3 million square feet consisting of rack storage, conveyor belts, loading and unloading areas, and office space. Hundreds of trucks go out every week from the distribution centers. Tr. 64:23-65:23; 40:23-41:8. Respondent's California headquarters, sprawling over two buildings, employs about a thousand employees. Tr. 65:19-66:11. Moreover, its California call center employs approximately 30 customer service employees. Tr. 66:15-20; Tr. 78:17-21.

Sallie Taylor (Taylor) has been Respondent's Director of Talent Development and Employee Relations since February 2019. Prior to assuming that role, she held other positions including Regional Human Resources Manager, Senior Human Resources Manager, Director of Store Support Programs, and Director of HR Store Programs. Tr. 18:13-20:24. As a Director of Talent Development and Employee Relations, Taylor manages the field training and development teams by providing training and development programs to retail store associates,

managing the employee relations teams (which in turn manages corporate employee relations and support field employee relations). Tr. 20:20-21:9.

Notably, Taylor was not involved in the creation of Respondent's Employee Handbook and has no personal knowledge regarding the creation of the Rules. Rather, Respondent's senior manager of HR at the corporate office, associate general counsel, and general counsel were responsible for the creation of the Handbook. Tr. 25:25-26:4. Taylor first learned about the Rules when they were published and learned of Respondent's intention regarding them after unspecified conversations.<sup>4</sup> Tr. 29:8-18. Taylor does not work in safety and has no personal knowledge regarding work accidents. Tr. 77:25-78-11.

Moreover, Respondent maintains an employee intranet system where employees can take classes, see their pay information, access their reviews, and receive employee handbooks. Tr. 54:14-55:14; 56:9-57:5.

## **B. The Overly Broad Rules**

At page 17 of its Employee Handbook, Respondent maintained the following policy:

### **PROPRIETARY AND CONFIDENTIAL INFORMATION**

[1] Employees may have access to Proprietary and Confidential information during the course of employment with Harbor Freight Tools. Each Employee shall ensure that Proprietary and Confidential Information is used only for valid company purposes. **Employees are prohibited from disclosing Proprietary, Confidential, or other information about the operations of Harbor Freight Tools to third parties except as directed in writing by an authorized representative or officer of Harbor Freight Tools.**

[...]

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<sup>4</sup> To the extent that Respondent relies upon these unspecified conversations to prove its purported business justifications for the Rules, they should not be credited. Fed. Rule Evidence 801.

[3] Third Party typically includes members of the media or press, members of governmental agencies, insurance company representatives, customers, vendors, suppliers, law enforcement, and the public.

[...]

[5] **Confidential Information includes, but is not limited to, information from employee personnel files [...]**

[6] **This policy shall include events and circumstances that involve Harbor Freight Tools, its customers, or its employees.**

[...]

GCX 2 (Emphasis added).

Respondent acknowledges that confidential information includes personal information, addresses, reviews, pay information, and discipline. Tr. 35:5-10; 59:7-13. Respondent claims that the rule is intended to prevent unauthorized disclosure of proprietary and confidential information and to protect the company, its associates, and its customers. Tr. 31:1-14; 34:23-35:2. Respondent also contends that there is nothing that stops employees from disclosing information obtained from their personnel file. Tr. 79:1-11. Respondent's contention, however, is rebutted by the plain language of the rule and Respondent presented no credible evidence that employees can share or have shared personnel file information. In fact, in the same line of questioning, Taylor admitted that employees would be expected to stop speaking about business information while a customer is in the restroom with them. Tr. 79:19-80:3.

Equally important, Respondent admitted that it never communicated to employees that its confidentiality rule does not prohibit them from disclosing events or circumstances relating to their working conditions or employment or that it does not prohibit them from disclosing information about events or circumstances as it relates to union organizing. Tr. 63:5-14.

At page 18 of its Employee Handbook, Respondent maintains the following policy:

**SOLICITATION AND/OR DISTRIBUTION**

[ ... ]

**With respect to employee activity, Harbor Freight Tools prohibits all solicitation activities in Harbor Freight Tools' work areas for any purpose**, including without limitation, for the purpose of financial gain, subscriptions, lotteries, or charities, religious or political causes, memberships, outside organizations, or other personal matters unrelated to employment with Harbor Freight Tools. Employees may solicit co-workers about causes, interests, political issues, and membership during breaks or lunches and other non-working time in non-work areas, so long as employees do not disrupt or interfere with ongoing Harbor Freight Tools operations or harass other employees.

[ ... ]

For purposes of this policy only, **"work area" is defined as any area where actual work is performed for Harbor Freight Tools.** Likewise, **"non-work area"** is defined to include cafeterias, lobbies, parking lots, break rooms, and restrooms, but excludes any areas where customers or clients may congregate or employees perform work for Harbor Freight Tools. **"Working time"** is defined as periods when employees are performing job duties on behalf of Harbor Freight Tools.

[ ... ]

GCX 2 (Emphasis added)

Respondent's Solicitation and/or Distribution policy prohibits all solicitation activities in all its work areas for any purpose, including solicitation for outside organizations and unions, during non-working time. Tr. 66:23-67:13.

Respondent's belated attempts to save the rule should not be credited. Taylor claims that its solicitation prohibitions only apply during working time hold no weight. When shown that the plain language of the rule does not reference working time, her

testimony became evasive and defensive. Tr. 67:5-71:9. Respondent presented no evidence that it communicated to its employees that its no solicitation prohibitions only apply during working time.

Likewise, when confronted on whether the rule applies to Respondent's warehouse areas at its distribution centers, Taylor suddenly did not feel "comfortable" in giving an answer. Tr.71:10-19. Similarly, when asked whether the rule applies to Respondent's calls center, Taylor again did not "feel comfortable" answering. Tr. 72:9-14. Taylor also claims that if an employee is out in the parking lot, not doing work and not on the work, she "would not view that as a work area." Tr. 89:10-23. But there is no evidence that this was communicated to employees. Even so, Taylor's contentions are easily refuted by the rule's plain language. It is nothing but a post-hoc, desperate attempt to save an overly broad rule.

To justify its no solicitation rule, Respondent claims that it is intended to address safety concerns, including distracted employees and productivity. Tr. 39:12-42:22. However, Respondent did not address how these concerns apply in situations when employees who are not on working time may be soliciting other employees who are likewise not on the clock.

At page 34-35, Respondent maintains the following policy:

**SOCIAL MEDIA AND NETWORKING**

[ ... ]

**Guidelines**

- (1) Do not make any claims about Harbor Freight Tools [ ... ] that are not substantiated (i.e., for which you do not have adequate proof to back up the claim).

(2) Do not make any factually inaccurate statements, particularly statements that may be disparaging [ ... ], regarding Harbor Freight Tools [ ... ] or Harbor Freight Tools' [ ... ] officers [ ... ].

GCX 2. Respondent's definition of "officers" includes its chief financial officer, a person in the role of chief executive officer, executive vice president, president, and owner. Tr. 75:8-21.

Respondent claimed that its Social Media and Networking policy is aimed towards preventing false, misleading, or defamatory statements, harassment, and to avoid violating Federal Trade Commission (FTC) regulations related to ensuring that testimonials and endorsements are "true." Tr. 47:3-50:19; 52:3-22. However, Respondent maintains a separate rule specifically addressing false, misleading and defamatory statements, harassment, and FTC requirements. GCX 2 (page 35 of Employee Handbook). Respondent also claims that its Social Media and Networking policy is intended to ensure that employees post their own opinion and to make it clear that they are posting their own opinion and not the opinion on behalf of Respondent or as its agent. Tr. 48:5-11.

The Rules, in effect from July 5, 2016 to January 20, 2020, were nationwide in scope and were applicable to employees at all of Respondent's facilities, including its distribution centers, retail stores, and corporate offices. Tr. 25:1-23; 57:6-58:28; GCX 2.

In January 20, 2020, Respondent published and distributed a new employee handbook that superseded the 2016 handbook and placed posters notifying employees of the new publication. However, neither the new handbook nor the posters mention that the Rules violated Section 8(a)(1) of the Act or that Respondent would not interfere with Section 7 rights in the future. Tr. 53:13-56:4; RX 1; RX 2.

### III. ANALYSIS

#### A. Legal Standard

In *Boeing*, 365 NLRB No. 154 (Dec. 14, 2017), the Board held that, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, it will evaluate two things:

- (i) the nature and extent of the potential impact on NLRA rights, *and*
- (ii) legitimate justifications associated with the rule.

*Id.*, slip. op at 3 (emphasis in original). The Board stated that it will conduct this evaluation “consistent with the Board’s ‘duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,’ focusing on the perspective of employees.” *Id.* (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)). The Board stated that, in so doing, “the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral),” and make “reasonable distinctions between or among different industries and work settings.” *Boeing*, 365 NLRB No. 154, slip op. at 15. The Board stated that it will also account for particular events that might shed light on the purpose served by the rule or the impact of its maintenance on Section 7 rights. *Id.*, slip op. at 16.

The Board stated that, in applying this test, it will place rules into three categories:

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the “harmonious interactions and relationships” rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.

- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

*Id.* at 3-4. The Board clarified that these three categories “will represent a classification of *results* from the Board’s application of the new test. The categories are not part of the test itself.” *Id.* at 4 (emphasis in original).

The Board’s decision in *The Boeing Company* “did not disturb longstanding precedent governing employer restrictions on solicitation and distribution, which already strikes a balance between employee rights and employer interests. *UPMC*, 366 NLRB No. 142, slip op. at 1 fn. 5 (2018); see also GC 18-04, “Guidance on Handbook Rules Post-*Boeing*” (Jun. 6, 2018) at 1-2. It is well-established that employees have a right to solicit during non-working time. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962).

Solicitation and distribution are not the same in the legal sense. Traditionally “solicitation and distribution of literature or *different* organizational techniques and their implementation pose[d] *different* problems both for the employer and for employees.” *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619 (1962) (emphasis in original). Solicitation is viewed as an oral request; distribution is considered handing out literature. *Id.* at 617–618. Because of the difference in legal concepts, the solicitation sentence is analyzed separately from the distribution sentence.

An employee may solicit for Section 7 concerns outside of working hours. *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1249, reh’g denied 968 F.2d 18 (5th Cir. 1992), cert.

denied 506 U.S. 985 (1992). Rules prohibiting solicitation during working time are presumptively lawful because “. . . that term denotes periods when employees are performing actual job duties, periods which do not include the employee’s own time such as lunch and break periods.” *Our Way*, 268 NLRB 394, 394–395 (1983). An employer may ban solicitation in working areas during working time; however, the ban cannot be extended to working areas during nonworking time. *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295, 1296 (2011). A solicitation rule is presumptively invalid when solicitation is prohibited during the employee’s own time. *Our Way*, 268 NLRB at 394.

## **B. Argument**

### **1. Proprietary and Confidential Information**

Respondent’s Proprietary and Confidential Information policy is unlawful under the *Boeing* standard. The rule is unlawful to the extent that it prohibits employees from disclosing to third parties employee information, including from employee personnel files. Absent any additional context, employees would reasonably read “personnel files” to include contact and other information concerning wages, benefits, disciplinary actions, and other terms and conditions they are permitted to discuss with a union or each other, and Respondent has failed to identify a legitimate business reason for the rule or impinging on this aspect of employee Section 7 rights.

Paragraph [6] of the policy, which reads “This policy shall include events and circumstances that involve Harbor Freight Tools, its customers, or its employees.”), when reasonably read, modifies paragraph [1], which states: “Employees are prohibited from disclosing Proprietary, Confidential, or other information about the operations of Harbor Freight Tools to third parties except as directed in writing by an authorized representative or officer of

Harbor Freight Tools” and thus prohibits disclosure of information about events or circumstances involving the Employer’s employees. Consequently, paragraph 6 encompasses, and in turn prohibits, the disclosure of information about events or circumstances involving the Employer’s employees.

Moreover, insofar as paragraph [5], which defines “Confidential Information” to include “information from employee personnel files”, such information would include employees’ wage rates and/or salaries, disciplines, and other items that employees are permitted to discuss concerted under Section 7.

Respondent has failed to demonstrate any legitimate justification for its policy that would outweigh its employees’ Section 7 rights. The right to communicate with other employees about their terms and conditions of employment is a core Section 7 right. *See Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491, (1978); *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003); *NCR Corp.*, 313 NLRB 574, 576 (1993); *Providence Hospital*, 285 NLRB 320, 322 (1987).

Respondent claims that its rule is intended to prevent unauthorized disclosure of proprietary and confidential information and to protect the company, its associates, and its customers. While protecting proprietary information is a legitimate business justification, the rule is overly broad because, as admitted by Respondent, it sweeps in confidential information which it defines to include terms and conditions of employment, including events or circumstances relating to their working conditions, that employees have a right to discuss with third parties. Notably, Respondent never communicated to its employees that its confidentiality rule does not prohibit them from disclosing events or circumstances relating to their working conditions or employment or that it does not prohibit them from disclosing information about events or circumstances relating to union organizing.

Thus, Respondent's rule directly interferes with employees' core Section 7 rights, and Respondent identified no legitimate interest warranting maintenance of this broad restriction. Therefore, Respondent's maintenance of its Proprietary and Confidential Information violated Section 8(a)(1) of the Act.

## **2. Non-Solicitation/Distribution**

Based on long-standing Board precedent, Respondent's prohibition on employees soliciting in working areas during non-working time is unlawful. Employees can only solicit in non-working areas during non-working time, a restriction that the Board, Courts of Appeals, and the Supreme Court have long held is unlawful. *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295, 1296 (2011); *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987) (“[A]n employer may not generally prohibit union solicitation . . . during nonworking times or in nonworking areas.”) (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-113 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945)).

The guiding principle is that rules prohibiting employee solicitation during working time must “state with sufficient clarity that employees may solicit on their own time.” *Our Way, Inc.*, 268 NLRB at 395. Employees' right to solicit coworkers on their own time (i.e. during non-working time) includes the right to do so in their work areas. In other words, employees have a right to solicit in their work areas during non-working time. See, e.g., *Grill Concepts, Inc.*, 364 NLRB No. 36, slip op. at 1, 26-27 (2016) (maintenance of rule that prohibited employees from soliciting in their work areas was unlawful). The *Boeing* decision “did not change the balancing test involved in assessing the legality of . . . no-solicitation . . . rules.” *UPMC*, above, slip op. at 1 fn. 5. As Respondent's rule runs contrary to long-standing Board precedent that has been upheld by federal courts, it is unlawful.

Respondent argues that its ban on solicitation in working areas during non-working time was in place because of concerns regarding safety and productivity. However, Respondent presented no credible evidence on how these purported justifications apply when employees are on non-working time.

Respondent's broad definition of working areas highlight the impact of the rule and its significant infringement on employee's Section 7 rights. Employees would not be able to solicit during non-working time in the parking lots while they are walking to or from their cars or even while taking a bathroom break. Respondent presented no evidence that it communicated to its employees that its no solicitation prohibitions only apply during working time.

As employees reasonably would read Respondent's No Solicitation and/or Distribution policy to mean that they are prohibited from soliciting in Respondent's work areas during non-working time, its maintenance of the rule, therefore, is violation of Section 8(a)(1) of the Act. Employees have a statutorily protected right to solicit sympathy and support from the general public, customers, and labor organizations. *NCR Corp.*, 313 NLRB 574, 576 (1993).

### **3. Social Media and Networking**

Respondent's maintenance of its Social Media and Networking policy is unlawful in two respects. First, the portions of the rule prohibiting employees from posting "any claims about Harbor Freight Tools [ ... ] that are not substantiated (i.e., for which you do not have adequate proof to back up the claim), and, in the next bullet point, "mak[ing] any factually inaccurate statements" are overly broad. Specifically, these provisions of Respondent's rule are unlawfully overly broad because of their impact on employees' Section 7 rights to post about their working conditions. Employees reasonably would interpret the rule to prohibit them from engaging in Section 7 activities, such as criticizing Respondent about working conditions, unless they had

“adequate proof” to back up the claim. Such a requirement is vague, open-ended, and presents an undue burden on employees. The rule chills employees from making even indisputably true statements because the employee may not have proof of the statement’s truth readily available or may not know where or how to obtain such proof.

The rule reflects Respondent’s lesser interest in preventing inaccuracy, innuendo, and rumor in order to combat “misinformation” and protect its reputation. Respondent’s lesser interest in preventing its employees from publicizing inaccuracies or rumors is outweighed by the potential adverse impact of the rule on employees’ Section 7 rights.

It can be argued that the rule at issue, together with the surrounding bullet points on page 35 of the Employee Handbook, Sections 3(a) and 3(b), GCX 2, suggest that Respondent wants to ensure that employees do not publicize testimonial or endorsements. Nonetheless, the plain meaning of the words of the rule is that employees are prohibited from making “any claims” about the Employer. Thus, employees would interpret the rule at issue to prohibit them from criticizing Respondent about any topic, including their wages and working conditions, rather than just testimonials or endorsements, unless they could justify the criticism with “adequate proof”.

Second, the rule’s prohibition on “disparagement” of Respondent has a significant impact on Section 7 rights. A general rule against disparaging the company, absent limiting context or language, would cause employees to refrain from publicly criticizing employment problems, including on social media. Such criticism is often the seed that becomes protected concerted activity for improving working conditions, the core of Section 7. Moreover, the rule is not limited to prohibiting disparagement of suppliers or products.<sup>5</sup> Instead, this portion of the rule is

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<sup>5</sup> Respondent has another rule addressing FTC requirements.

far broader than a typical civility rule because it is not limited to posts concerning co-workers, customers, or suppliers.

Although the Employer has a legitimate business interest in protecting itself against defamation, the rule's prohibition on statements that "may be disparaging [ ... ], regarding Harbor Freight Tools [ ... ] or Harbor Freight Tools' [ ... ] officers [ ... ]" goes well beyond that legitimate interest. That portion of the rule would reasonably be understood by employees as regulating the content of social media posts, rather than their manner or tone, and it is broad enough to encompass criticism of Respondent and its working conditions, a core Section 7 right, and it is not tailored to Respondent's legitimate interests in preserving customer relations and protecting its reputation, since it is not limited to posts about Respondent's suppliers or partners.

Moreover, Respondent's legitimate business justification to protect against false, misleading, or defamatory statements or harassment does not outweigh the rule's significant adverse impact on employees' protected conduct. First, the language of the rule does not target defamatory statements or intentional misrepresentations about Respondent; the rule does not even use the words "defamation" or "misrepresentation". In fact, Respondent has separate rules addressing those concerns. Because the rule at issue does not target defamatory statements or intentional misrepresentations about Respondent, Respondent's interest in preventing defamation or intentional misrepresentation about Respondent is not present.

Although Respondent may be understandably wary of reputational damage that can occur when criticized by its own employees, such an interest does not outweigh the core NLRA rights undermined by an overly broad ban on disparagement of the company. Rules against disparaging Respondent do not implicate the same civility and anti-harassment interests involved in rules against disparaging coworkers, customers, Respondent's services or suppliers. Since this rule is

an absolute ban on employees making any comments disparaging Respondent on social media, and is not limited to prohibiting disparagement of Respondent's customers, products, suppliers or services, the provision would have a significant impact on online protected concerted activity that is not outweighed by any legitimate interests of Respondent.

Therefore, Respondent's maintenance of its Social Media and Networking policy violated Section 8(a)(1) of the Act.

#### **4. Respondent Has Not Repudiated its Unfair Labor Practices**

For a repudiation to serve as a defense to an unfair labor practice finding, "it must be timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct." *Alternative Cmty. Living, Inc.*, 362 NLRB 435, 436 (2015) quoting *Casino San Pablo*, 361 NLRB No. 148, slip op. at 4 (2014). Additionally, there must be adequate publication of the repudiation to the employees involved and the repudiation must assure employees that, going forward, the employer will not interfere with the exercise of their Section 7 rights. *Id.*, citing *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978).

Here, Respondent has failed to present enough evidence to meet its burden that its purported repudiation met all of the above-specified requirements. Respondent cannot effectively repudiate its unlawful rules simply by rescinding the Rules and notifying employees that it has implemented new rules. *Casino San Pablo*, above, slip op. at 4-5, citing *DaNite Sign Co.*, 356 NLRB No. 124, slip op. at 7 (2011) (affirming judge's finding that the employer did not cure its Section 8(a)(1) violation by issuing a revised handbook that did not have the unlawful rule at issue). Respondent presented no evidence that, going forward, it informed employees that it would not violate their Section 7 rights. Likewise, there is no evidence that Respondent informed employees that it notified employees that they have a Section 7 right to discuss wages and terms

and conditions of employment. See *DaNite Sign, Co.*, above. Therefore, Respondent cannot escape its Section 8(a)(1) violations by claiming it repudiated its unfair labor practices.

#### **IV. CONCLUSION**

Based on the foregoing reasons, and the credible record evidence, Counsel for the General Counsel respectfully submits that Respondent has violated Section 8(a)(1) Act as alleged in the Complaint by maintaining the Rules. The ALJ should so find and recommend the Board fashion an appropriate remedy, including a nationwide posting of the Notice to Employees attached as Appendix A and a posting of that Notice to Employees in its intranet. The General Counsel further seeks all other relief as may be just and proper to remedy the alleged unfair labor practices.

Dated at Albuquerque, New Mexico, this 28<sup>th</sup> day of April 2020.

Respectfully submitted,

/s/ Rodolfo Martinez

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## Appendix A

**(To be printed and posted on official Board notice form)**

### **SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** interfere with, restrain, or coerce you in your exercise of the above rights.

**WE WILL NOT** maintain in our Employee Handbook, or anywhere else, rules that interfere with your right to share information relating to your wages, hours, or other terms and conditions of employment, in furtherance of your exercise of the above rights, including:

#### **PROPRIETARY AND CONFIDENTIAL INFORMATION [At Page 17]**

- Confidential information includes, but is not limited to, information from employee personnel files . . . .
- This policy shall include events and circumstances that involve . . . its employees.

**WE WILL NOT** maintain in our Employee Handbook, or anywhere else, rules that interfere with your right during non-working time to solicit in our work areas that are not on the retail floor, in furtherance of your exercise of the above rights, including:

#### **SOLICITATION AND/OR DISTRIBUTION [At Page 18]**

- With respect to employee activity, Harbor Freight Tools prohibits all solicitation activities in Harbor Freight Tools' work areas for any purpose . . .

**WE WILL NOT** maintain in our Employee Handbook, or anywhere else, rules that interfere with your right to make claims or statements about us, our services, or our officers on social media, in furtherance of your exercise of the above rights, so long as your claims or statements are not maliciously false, including:

#### **SOCIAL MEDIA AND NETWORKING GUIDELINES [At Page 36]**

- Do not make any claims about Harbor Freight Tools or its services . . . that are not substantiated (i.e., for which you do not have adequate proof to back up the claim.)
- Do not make any factually inaccurate statements, particularly statements that may be disparaging . . . regarding Harbor Freight Tools . . . or Harbor Freight Tools' officers . . . .

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL** rescind the rules set forth above, and **WE WILL** a) furnish you with inserts for the current Employee Handbook that advise that the rules have been rescinded; or b) publish and distribute a revised Employee Handbook that does not contain the rules.

**HARBOR FREIGHT TOOLS USA, INC.**

\_\_\_\_\_  
(Employer)

**Dated:** \_\_\_\_\_

**By:** \_\_\_\_\_  
(Representative) (Title)

*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at <https://www.federalrelay.us/tty> (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.*

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## CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in *Harbor Freight Tools USA, Inc.*, 28-CA-232596 was served via E-Gov, E-Filing, and E-Mail, on this 28<sup>th</sup> day of April 2020, on the following:

### **Via E-Gov, E-Filing:**

Honorable Gerald Etchingham  
Administrative Law Judge  
NLRB Division of Judges  
San Francisco Branch  
901 Market Street, Suite 300  
San Francisco, CA 94103-1779

### **Via Electronic Mail:**

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