

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(PETITION FOR REVIEW FROM THE NLRB)**

MOTOR CITY PAWN BROKERS INC.,

Petitioner/Cross-Respondent

Case No. 20-1730/20-1854

v.

NLRB Case 07-CA-179458

NLRB Case 07-CA-179461

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**TERRENCE WALKER,
PATRICIA TILMON**

Intervening Parties

**MOTOR CITY PAWN BROKER, INC.'S FIRST BRIEF,
ORAL ARGUMENT REQUESTED**

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ORAL ARGUMENT REQUESTED

Petitioner Motor City Pawn Brokers, Inc. (“MCPB”) requests oral argument due to the novel legal issues related to MCPB’s employment documents, especially the enforcement of the arbitration clause and MCPB’s monetary liability for terminating employees who refused to sign employment agreements.

CORPORATE DISCLOSURE

Any nongovernmental corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation: There is no such corporation.

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JURISDICTIONAL STATEMENT

Administrative Law Judge Tafe issued her Decision on October 22, 2018 (Record, pp. 127-161). On November 14, 2018, she issued an Errata (Record, pp. 164-165). The NLRB issued its Decision, Order, and Notice to Show Cause (the “NLRB Decision”) on July 24, 2020 (Record, pp. 322-349). This Petition for Review was timely filed on August 3, 2020. 29 U.S.C. §160(e).

ISSUES PRESENTED FOR REVIEW

The NLRB erred when it ruled against MCPB on the following issues:

1. Whether MCPB’s employment agreement unlawfully required arbitration of NLRA “claims.”
2. Whether the agreement contained an invalid indemnity clause.
3. Whether MCPB was liable for prohibiting “unauthorized disclosure of handbook.”
4. Whether the agreement unlawfully restricted solicitation and association.
5. Whether MCPB could be monetarily liable for backpay and related charges when the employees’ discharges were unrelated to the allegedly problematic aspects of the agreement.
6. Whether the claims of two non-parties were timely.

STATEMENT OF THE CASE

Founded in 1990, MCPB remains family owned and operated. (7/27/17 Tr., at 34–35, 81–82) (Record, pp. 41-42, 88-89). Mark Aubrey, MCPB’s owner, has been in the pawn industry since he was seventeen years old, when his father owned a store in Warren. (*Id.* at 34) (Record, p. 41). It has developed into a chain of four entities with almost 100 active employees. (*Id.*) (Record, p. 41).

Each store has a different Store Manager, as well as one or two Assistant Managers. (*Id.* at 35 – 36) (Record, pp. 42-43). District Manager, Chris Farraj, works closely with Mr. Aubrey to make sure policies are being enforced lawfully and consistently at each store. (*Id.* at 35–36) (Record, pp. 42-43). Mr. Farraj also manages the performance of managers and employees at each location, a role that Mr. Aubrey did not assume. (*Id.* at 35, 39–40) (Record, pp. 42, 46-47). Pawn brokers at each store are responsible for providing customer service, authenticating and appraising collateral property from customers, and establishing a loan against the collateral. (*Id.* at 37–39) (Record, pp. 44-46).

Mr. Aubrey runs his business based on principles of wanting to keep employees happy, so customers are happy. (*Id.* at 45) (Record, p. 52). Given that the business started as a family operation, Mr. Aubrey has always treated employees like his family and attributes his success to this fundamental relationship. (*Id.*) (Record, p. 52). MCPB is committed to fair dealing and high

ethics, as is reinforced in MCPB's Business Ethics and Conduct policy, which states, "Motor City Pawn Brokers will comply with all applicable laws and regulations and expects its directors, officers, and employees to conduct business in accordance with the letter, spirit, and intent of all relevant laws and to refrain from any illegal, dishonest, or unethical conduct." (GC-4 at p. 9) (Record, p. 233).

Before February 2016, MCPB maintained a general handbook, without requiring signature, that described the business of MCPB, MCPB's mission statement, customer service expectations, and obligations to maintain confidentiality. (7/27/17 Tr., at 42-43) (Record, pp. 49-50). It also asked employees to sign a non-competition agreement because approximately three to four years prior, MCPB had a long-time pawn broker who quit, without any notice, and started working in a management position for a pawn broker less than five miles down the street. (*Id.* at 43) (Record, p. 50). In that role, the former employee divulged all of the proprietary and confidential information about the operations of MCPB. (*Id.*) (Record, p. 50).

Some employees, including Ringo Salzer and Gianluca Bartolucci, refused to sign the prior non-competition agreement. (*Id.* at 44) (Record, p. 51). According to Mr. Aubrey, Mr. Salzer declined to sign because he had some troubles in another state where he had signed a similar document and could not subsequently obtain employment. (*Id.* at 44, 54) (Record, pp. 51, 61). Mr. Bartolucci never

explained why he did not sign the agreement. (*Id.* at 44) (Record, p. 51). Nonetheless, Mr. Aubrey permitted them to continue working because he trusted both of these employees at that point. (*Id.* at 45) (Record, p. 52).

MCPB retained legal counsel to review and revise the Employee Handbook and Employment Agreement to ensure that they complied with the law and that MCPB was adequately protected in the event other employees might leave to work for a competitor, as happened previously and again more recently. (*Id.* at 49, 51) (Record, pp. 56, 58). Mr. Aubrey decided to require all employees, in whom he had invested extensive time and money training about the proprietary business operations and strategies of MCPB, to sign agreements that would protect such operations. (*Id.* at 48–49) (Record, pp. 55-56). Mr. Aubrey intended to make the handbook transparent, short, simple, and effective, to support future growth of the business. (*Id.* at 49) (Record, p. 56). He retained an attorney who specializes in human resources and employment issues to make the revisions. (*Id.* at 51) (Record, p. 58).

Legal counsel for MCPB revised the Employment Documents, paying particular attention to recommendations made by General Counsel, Richard F. Griffin, Jr., in his March 18, 2015 “Report of the General Counsel Concerning Employer Rules” (“March 2015 Memorandum”)(withdrawn on December 1,

2017).¹ Accordingly, the revised Employee Handbook includes specific examples of prohibited conduct, context about the legitimate purpose for the policies, and disclaimers specifically protecting employees' rights under the NLRA. (GC-2, 3, and 4) (Record, pp. 217-222, 223-224, 225-269). The Employment Documents were also tailored to protect the legitimate business interests of MCPB, given the history of prior employees taking proprietary and confidential information to competitors and soliciting current employees.

The Employment Documents were distributed to MCPB's employees in February 2016 contemporaneously, with ample time to review the terms, consult with counsel, and speak with representatives of MCPB prior to signing. (7/27/17 Tr. at 51–54, 69, 78–79, 82, 87, 104) (Record, pp. 58-61, 76, 85-86, 89, 94, 111). At a training to roll-out the new policies, legal counsel for MCPB reviewed protected Section 7 rights with Mr. Aubrey and some of his managerial staff. Managers at each store asked their employees to sign these Employment Documents for continued employment, but made clear that employees could address any questions with Mr. Farraj or Mr. Aubrey. (*Id.* at 51–52) (Record, pp. 58-59).

¹ <https://www.nlr.gov/guidance/memos-research/general-counsel-memos>

Following distribution of the Employment Documents, no employee alleged that s/he had been restricted from engaging in protected activity – or even claimed that s/he had attempted to engage in protected concerted activity. Likewise, no such allegation has been made in the Third Amended Charge filed by Charging Parties. (Record, pp. 179-182). All employees signed the Employment Documents except for the Charging Parties and Alleged Discriminatees.² (7/27/17 Tr., at 54–55) (Record, pp. 61-62). Charging Parties and Alleged Discriminatees all worked at the Warren store, as pawn brokers, except for Mr. Salzer, who worked as a pawn broker at the Roseville store under a different Store Manager. (*Id.* at 40–41) (Record, pp. 47-48).

In response to the Employment Documents, Mr. Salzer raised concerns about the non-competition restraint in the Employment Agreement, based on a negative experience he had previously experienced after he signed a non-competition restriction with a different employer. (*Id.* at 44)(Record, p. 51). This non-compete restraint is lawful and not challenged by Charging Parties or General Counsel. Although Mr. Salzer may have had other concerns about the Employment

² There were *seven iterations* of the charges and complaints in this matter. The initial charge filed by Patricia Tilmon and Terrence Walker (“Charging Parties”), was followed by three amended charges, a Complaint, amended Complaint, and withdrawal of claim in Complaint. (Record, pp. 179-216 [these are the Charges]). Ringo Salzer and Gianluca Bartolucci (“Alleged Discriminatees”) were not identified until the Second Amended Charge, filed on September 15, 2016. (Record, pp. 187-189). They were not listed as Charging Parties.

Agreement, he only raised his concern about the non-competition restraint. (7/27/17 Tr. at 44, 91–92) (Record, pp. 51, 98-99). MCPB terminated the employment of Mr. Salzer on account of his refusal to sign the Employment Agreement. (*Id.* at 26–27) (Record, pp. 33-34). Mr. Salzer admitted that Mr. Aubrey had offered to let him return to work if he agreed to sign the Employment Documents. (*Id.* at 87) (Record, p. 94).

Mr. Bartolucci was believed to have resigned to work for a competitor of MCPB. (*Id.* at 27) (Record, p. 34). Mr. Bartolucci may have had concerns about signing a non-competition restriction in the Employment Agreement, based on his testimony, but these concerns were not conveyed to MCPB prior to separation. (*Id.* at 27, 44) (Record, pp. 37, 51). Around the time when the Employment Documents were distributed, Mr. Bartolucci reached out to a prior employee of MCPB who had gone to work for a competitor to explore the option of working together. (*Id.* at 100–103) (Record, pp. 107-110). Within one week of separation from employment with MCPB, Mr. Bartolucci was working for the competitor. (*Id.* at 102) (Record, p. 109).

Ms. Tilmon was on leave when her Store Manager texted her, asking if she was going to sign the Employment Documents and stating, “I was told that you have to sign before returning.” (GC-7 and 7/27/17 Tr., at 77) (Record, pp. 84, 272). Ms. Tilmon felt comfortable talking with her Store Manager about the

Employment Documents (*Id.*, at 78–79) (Record, pp. 85-86), but instead responded to his inquiry with, “Ok. Do fire me” and again, “So fire me.” (GC-7 and 7/27/17 Tr., at 72) (Record, pp. 79, 272).

Mr. Walker presented questions about the Employment Documents with his Store Manager, who then connected Mr. Walker with Mr. Farraj. (*Id.*, at 66 – 67) (Record, pp. 73-74). Mr. Farraj coordinated a conference call for Mr. Walker to speak with legal counsel for MCPB, who addressed each of his concerns. (*Id.* at 67–69) (Record, pp. 74-76). Mr. Walker posed questions related to lawful terms, completely unrelated to any protected activity or Section 7 rights, such as the location of arbitration in Southfield and the potential expenses associated with indemnification. (*Id.* at 64–65) (Record, pp. 71-72). Mr. Walker admitted that the replies from MCPB were consistent with MCPB’s open door policy allowing employees to express themselves. (*Id.* at 66–67) (Record, pp. 73-74).

The employment of Charging Parties ended based on their refusal to sign the Employment Documents, which MCPB interpreted as insubordination by refusing to agree to abide by the lawful work rules and contractual obligations required to work as an at-will employee for MCPB and protect MCPB’s legitimate business interests. (*Id.* at 30–32) (Record, pp. 37-39).

On June 29, 2016, the Charging Parties filed these charges alleging that they were fired based on (a) their having spoken with other employees about their

concerns related to the Employment Agreement and (b) their refusal to sign the Employment Agreement. (GC-1a) (Record, pp. 213-215). Notably, the first allegation (a) was later dropped. Charging Parties merely allege and testified that their employment was terminated based on their refusal to sign the documents, without any consideration about how reasonable employees of MCPB would have interpreted the Employment Documents and without alleging that MCPB was acting to infringe on protected concerted activity. (GC-1p at ¶¶ 6 and 7/27/17 Tr., at 50, 54, 72–73, 80–81, 89–90) (Record, pp. 57, 61, 79-80, 87-88, 96-97).

SUMMARY OF ARGUMENT

MCPB used carefully-drafted employment documents, drafted by experienced employment counsel, that tracked existing law. When four employees refused to sign these documents for a variety of reasons having nothing to do with Section 8(a)(1) of the National Labor Relations Act (“NLRA”), MCPB terminated their employment for insubordination. MCPB did not interfere in any way with these employees’ Section 7 rights to engage in protected concerted activity.

The NLRB Decision represents a significant expansion of the NLRA’s express language, along with some fundamental misinterpretations of MCPB’s employment documents, and it should be reversed.

NLRB’S STANDARD OF REVIEW

A. *Boeing* Standard for Evaluating Handbook Policies

The Board established a new standard for evaluating whether handbook policies are unlawfully overbroad in *The Boeing Company*, 365 NLRB 154 (2017) (“*Boeing*”). In *Boeing*, the Board overruled the “reasonably construe” standard previously set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004). In addition, General Counsel for the NLRB issued a June 6, 2018 Memorandum titled “Guidance on Handbook Rules Post-*Boeing*” (“2018 Memorandum”)³ that provides examples of the kinds of rules that are expected to fall under each category. The rules and examples are as follows:

- Rules that are “*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” shall be placed in **Category 1. *Boeing***, 365 NLRB at 3-4. Specific examples of rules that fall under this category include: civility rules (prohibiting conduct detrimental to business operations or impedes harmonious relationships, rude, condescending, or socially unacceptable behavior, disparaging or offensive language); no photography/recording rules; rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations;

³ <https://www.nlr.gov/guidance/memos-research/general-counsel-memos>

disruptive behavior rules; rules protecting confidential, proprietary, and customer information/documents; rules against defamation or misrepresentation; rules against using employer intellectual property; and rules banning disloyalty or self-enrichment. (2018 Memorandum at 3-15).

- “[R]ules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications” shall be considered **Category 2**. *Boeing*, 365 NLRB at 4. Examples of rules that are expected to fall under Category 2 include: confidentiality rules broadly encompassing “employer business” or “employee information”; rules regarding disparagement or criticism of the employer; rules banning off-duty conduct that might harm the employer; and rules against making false or inaccurate statements. (2018 Memorandum at 16-17).
- “[R]ules 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” shall be placed in **Category 3**. *Boeing*, 365 NLRB at 4. Examples of rules that fall under Category 3 include: confidentiality rules specifically

regarding wages, benefits, or working conditions; and rules against joining outside organizations. (2018 Memorandum at 17-20)

B. Board Standard for Interpreting Contracts

When applying the *Boeing* standard to the policies and provisions at issue, the basic rules of contract interpretation apply. See *NRC Corp.* 271 NLRB 1212, 1213 (1984) (“[W]hen an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is accordance with the terms of the contract as he construes it, the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.”) and *FSI*, 356 NLRB 606, 607 (2010) (“Where . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the union, we will not seek to determine which of two equally plausible contract interpretations is correct. *Atwood & Morill Co.*, 289 NLRB 794, 795 (1988). In such cases, the Board will not find a violation [], leaving the parties to resolve their contract dispute in an appropriate alternative forum.”)

The Board has decided that contracts “should be construed as a whole; and, whenever possible, effect should be given to all of their parts. Inconsistent clauses and provisions in conflict, in particular, should be construed so as to effectuate the intention of the parties, as gathered from the entire instrument. Provisions only apparently in conflict should be reconciled, if possible.” *Foreign Trade Export*

Packing Co., Inc., et al., 112 NLRB 1246, 1258-1259 (1955) (cited by *Madison Industries*, 349 NLRB 1306 (2007)) (emphasis added).

Where a clause is not clearly unlawful on its face, the Board has refused to presume that it is invalid merely because it was ambiguous and *might* be unlawfully applied. *Road Sprinkler Fitters, Local 669*, 357 NLRB 2140 (2011). In *Boeing*, the Board confirmed that “[a]mbiguities in rules are no longer interpreted against the drafter,” generalized provisions should not be interpreted as banning all activity that could conceivably be included, and rules must be viewed from an objectively reasonable employee “aware of his legal rights.” *Boeing*, 365 NLRB at 15-16, 4 n. 14, 17, n. 80, and 2018 Memorandum at 1.

THIS COURT’S REVIEW OF THE NLRB DECISION

Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157. Section 8 defines certain conduct as "unfair labor practice[s]" when committed by an employer or by a union. 29 U.S.C. §158(a)-(b). Challenged conduct must infringe on a right protected by Section 7 before it can constitute an unfair labor practice under Section 8(a)(1). 29 U.S.C. § 158(a)(1) ("It shall be an

unfair labor practice for an employer...to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the Act]....").

On a petition for review, this Court accepts the Board's factual findings and unfair-labor-practices conclusions if supported by substantial evidence in the record. Substantial evidence is not an exacting standard—it means "more than a mere scintilla" and "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, 587 U.S. ___; 139 S. Ct. 1148, 1154 (2019) (citation omitted). The Court reviews legal determinations *de novo*. *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. (UAW) v. NLRB*, 514 F.3d 574, 580 (6th Cir. 2008).

ARGUMENT

1. The NLRB and ALJ Erroneously Concluded that Requiring Employees To Arbitrate Claims Against MCPB Was Unlawful

The NLRB and ALJ concluded that MCPB's Employment Agreement and Contract violated Section 8(a)(1) to the extent they interfere with employees' right to file charges under the NLRA, to participate in Board proceedings, or to access the Board's processes. *See* JD-66-18 at 10 (Record, at pp. 353), NLRB Decision, n. 4. This conclusion is erroneous for four reasons.

First, recent case law confirms that an employer may mandate arbitration. Pursuant to the Federal Arbitration Act, "[a] written provision in any...contract evidencing a transaction involving commerce to settle by arbitration a controversy

thereafter arising out of such contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The savings clause of this provision permits a party to challenge an arbitration agreement pursuant to a generally applicable state law contract defense, such as fraud, duress, or unconscionability. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87, 116 S.Ct. 1652 (1996). "As arbitration is favored, those parties challenging the enforceability of an arbitration agreement bear the burden of proving that the provision is unenforceable." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013). There were no such considerations in this case.

The Supreme Court, upholding class action waivers in employment agreements, recently "stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act." *Epic Sys. Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1627 (2018). The Court reiterated that the FAA "establishes `a liberal federal policy favoring arbitration agreements.'"

This Court, applying *Epic Systems*, held that Congress did not intend for individual FLSA claims to be nonarbitrable. *Gaffers v. Kelly Servs., Inc.*, 900 F.3d 293, 296 (6th Cir. 2018) ("And because the FLSA does not `clearly and manifestly'

make arbitration agreements unenforceable, we hold that it does not displace the Arbitration Act's requirement that we enforce the employees' agreements as written."'). The primacy of the FAA should be respected in this case.

Second, the language in the Employment Agreement requires arbitration of “claims” that the employee may have against MCPB, not the independent enforcement action of the NLRB or EEOC that may arise out of an employee’s “charge.” See e.g. 29 U.S.C. §626(d).⁴ Thus, the Employment Agreement does not have a reasonable tendency to interfere with the exercise of Section 7 rights. And as a result, no balancing with the MCPB’s business justification is required; the Employment Agreement contains a *Boeing* Category 1 rule.

The Contract (a separate document) does not contain any express restriction on NLRA claims. (Record, p. 223). To the extent these two documents create ambiguity, the language must be viewed from the standpoint of an objectively reasonable employee.

⁴ In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), the Supreme Court explained that an arbitration agreement did not preclude an individual's right to file a charge and have the case investigated by the EEOC. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Supreme Court further held that an arbitration agreement between an employer and employee does not bar the EEOC from pursuing victim-specific relief in litigation on behalf of an employee who files a timely charge of discrimination.

General Counsel in this case did not offer any evidence on this point, instead arguing (based on a pre-*Boeing* analysis) that the Employment Agreement and Contract were facially invalid. But General Counsel's position is inconsistent with reality – imagine a situation where an employee believes s/he has an unfair labor practices claim and submits a charge to the NLRB for enforcement. At what point would the arbitration clause become operative? Never. And if General Counsel presumes that such an employee would actually decide not to submit such a charge to the NLRB in the face of arbitration language, General Counsel should have explained why such a presumption would be a reasonable interpretation of the Employment Agreement and Contract. It is not.

Third, it must be noted that none of the four employees pursued their own claims in any forum or specifically complained about the clause at issue. Therefore, the arbitration clause never became operative (i.e., MCPB never argued in any forum that the employees' claims did not belong in that forum, but in arbitration). A rule may not be deemed unlawful simply because it may *potentially* interfere with Section 7 rights. To the contrary, “[W]hen an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is accordance with the terms of the contract as he construes it, the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.” *NRC Corp.*, 271 NLRB at 1213.

Thus, these provisions may not reasonably be interpreted as infringing on Section 7 rights, should not be interpreted as such based on any ambiguity, and are therefore lawful. If the *Boeing* test even applies to the analysis, they should be considered Category 1 rules, and – if considered Category 2 rules, MCPB’s good faith effort to protect its interests including but not limited to, maintaining efficiency, timely addressing employee concerns, and preventing disruption of operations are not outweighed by the *possibility* of potential infringement on Section 7 rights by reading an ambiguous term against MCPB. If a violation is found, then the remedy should be limited to revision and notice, without an award of back pay to the four former employees.

2. The NLRB and ALJ Erroneously Concluded that the Requirement for Employees to Indemnify MCPB Was Unlawful

The ALJ concluded that the indemnity provisions of the Employment Agreement violated the Act. JD-66-18 at 13 (Record, pp. 356). The NLRB affirmed the ALJ’s conclusion without any further discussion.

The indemnification provision in the Employment Agreement is justifiably triggered when an employee breaches the Agreement through intentional and/or negligent acts and causes some damage to the company. *See* GC-2 at Section 8 (Record, pp. 220-221). *See Ajax Paving Indus., Inc. v. Vanopdenbosch Constr. Co.*, 289 Mich. App. 639; 797 N.W.2d 704, 710 (2010)(“indemnity contemplates reimbursement for injuries/losses that have already been incurred.”).

Unfortunately, the ALJ misunderstood the indemnification language when she concluded that it could be used as a sword against an employee pursuing a direct claim against MCPB. The ALJ decided that “I agree with the General Counsel that the extensive and broad indemnity provision potentially interferes with employees’ Section 7 rights by placing a heavy financial burden on the pursuit of claims.” That is not what the indemnification language says.

Compounding the problem, it is unclear how the ALJ made the leap to labeling the indemnification language a Category 3 rule, if a rule at all. This indemnification provision is not a limitation on the right of employees to file a charge with governmental administrative agencies; it simply advises employees of the MCPB’s rights to seek legal recourse in certain circumstances where MCPB has been damaged.

Given that there is no reasonable interpretation of restricting Section 7 rights and no indication of bad faith, the Court should apply NLRB standards for reviewing these contracts, and hold that these provisions are lawful without interpreting any ambiguity against MCPB. If the *Boeing* test even applies to the analysis, this should be considered a Category 1 rule that simply articulates an employer’s legal rights, and – if considered a Category 2 rule, MCPB’s good faith effort to protect their interests, including but not limited to, maintaining their legal rights and in good faith providing employees with notice of such rights, in the

event that their breach or other negligent actions cause damage to the company, are not outweighed by the *possibility* of chilling Section 7 rights. If a violation is found, then the remedy should be limited to revision and notice, without an award of back pay to the four former employees.

3. The NLRB and ALJ Erroneously Concluded that the Prohibition on Employee Disclosure of the Employee Handbook Was Unlawful

The NLRB Decision adopted the ALJ's findings that MCPB violated Section 8(a)(1) by "the rule prohibiting unauthorized disclosure of the Employee Handbook," although the NLRB reversed the ALJ's decision regarding disclosure of confidential information within the handbook. NLRB Decision, at 1.

There is some inconsistency here, since the NLRB expressly found that "objectively reasonable employees, reading the [handbook] provisions at issue here in context, would not interpret them to interfere with [Section 7] rights." NLRB Decision, at 5. Further, the NLRB concluded that "employees would reasonably understand, from the numerous examples of confidential information specified in the Employment Agreement and the Employee Handbooks, that they are limited to prohibiting disclosure of legitimately confidential and proprietary information rather than information pertaining to employees' terms and conditions of employment." *Id.* The NLRB therefore placed the confidentiality rules in Category 1(a) under *Boeing. Id.*, at n. 13.

There is no separate analysis of the specific language regarding disclosure of the handbook itself; indeed, the NLRB's favorable analysis of the language within the handbook should apply with equal force to disclosure of the handbook itself. Nothing would restrict an employee's rights to disclose "the terms and conditions of employment." As a result, this Court can conclude that the NLRB erred by isolating one aspect of the claim without any explanation by either the NLRB or the ALJ.

4. The NLRB and ALJ Erroneously Concluded that MCPB's Prohibitions and Limitations Affecting Solicitation and Association with other Employees Were Unlawful

The ALJ concluded that MCPB's rules prohibiting association and solicitation are significantly overbroad rules that unlawfully interfere with employees' rights to associate and communicate with other Employees. JD-66-18 at 17 (Record, p. 360). The only discussion in the NLRB Decision is found in footnote 5. Notably, this is not a case where MCPB took any action against any employee based on the subject language; the ALJ's concerns were all hypothetical.

It is important to understand the historical context: "solicitation" in NLRA jurisprudence generally refers to union solicitation, which is not an issue here. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) ("It is therefore not within the province of an employer to promulgate and enforce a rule

prohibiting union solicitation by an employee outside of working hours, although on company property.”). The ALR relied on *Republic Aviation*.

Again, the ALJ misinterpreted the relevant language in the Employment Agreement. The non-solicitation requirement was intended to prohibit employees from soliciting employees for the purpose of employment or association, or to terminate such relationship with MCPB. In this context, “association” means a work relationship, not a personal relationship. The clause does not prohibit an employee from discussing with other employees or former employees the terms or conditions of their employment, or otherwise organizing for their *mutual aid or protection*; there was no evidence in the record that MCPB ever interpreted the clause that way. The language in the Contract makes this clear. (Record, p. 223).

As with the other provisions, the ALJ interpreted an ambiguity against MCPB, without considering the appropriate standard for contract review and workplace rules under *Boeing*. The ALJ again disregarded MCPB’s legitimate and substantial interest in taking proactive measures to maintain employees’ continued employment by preventing them from being solicited by former employees to compete with MCPB.⁵

⁵ The Board has not deemed unlawful under the NLRA employer prohibitions of the solicitation of *on-duty* employees by off-duty employees. *Essendant Co. and Teamsters Local Union*, 365 NLRB 46, 47 (2017) (finding a policy lawful when it

Based on the foregoing, these provisions may not reasonably be interpreted as infringing on Section 7 rights, should not be interpreted as such based on any ambiguity, and should be deemed lawful. To the extent the *Boeing* test applies to the analysis, they should be considered Category 1 rules, and – if considered Category 2 rules, MCPB’ good faith effort to protect their interests are not outweighed by the *possibility* of potential infringement on Section 7 rights by reading an ambiguous term against MCPB. If a violation is found, then the remedy should be limited to revision and notice, without an award of back pay to the four former employees.

5. The NLRB and ALJ Erroneously Concluded that MCPB Unlawfully Terminated Four Employees

The NLRB and ALJ concluded that “[b]ecause maintaining these documents, including the Employment Agreement and the Contract and Receipt, violated Section 8(a)(1), discharging the employees for their failure to sign them also violated Section 8(a)(1).” JD-66-18 at 26 (Record, p. 369). This conclusion resulted in a backpay award.

General Counsel advocated for this strict liability analysis. When MCPB questioned employees about their concerns about the Employment Agreement, General Counsel stated that “the nature of what the concerns are doesn’t matter.”

prohibited solicitation while either employee “is on his or her working time” and without referencing non-work time or areas).

(7/27/17 Tr. at 64)(Record, at 71). Very explicitly, General Counsel stated “our position is it doesn’t matter if he didn’t like just the print of the – it doesn’t matter. It’s a bad agreement. He was fired for not signing it. That is our theory.” (*Id.*, at 72, 81) (Record, at 79, 88). The ALJ suggested that she “[didn’t] see the relevance” of the questions and suggested that MCPB “move on from that.” (*Id.*)

In this colossal expansion of the language of Section 8(a)(1), the ALJ relied on *SF Markets*, 363 NLRB 146 (2016), *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001), and *Denson Electric Co.*, 133 NLRB 122 (1961). The NLRB also relied on *Alorica, Inc.*, 369 NLRB 25 (2019).

These decisions do not support the NLRB’s and ALJ’s conclusions because this case is fundamentally different: there is no statutory support in Section 8(a)(1) and no causal connection between the allegedly violative language and the adverse employment action. Backpay should not have been awarded.

There should be no doubt about the requirement of a causal connection: Section 10(c) states that “where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for *the discrimination* suffered by him.” See *Lou’s Transport Inc. v. NLRB*, 945 F.3d 1012, 1019 (6th Cir. 2019)(citing *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965)) (“The back pay remedy has the twofold purpose of reimbursing employees for actual losses suffered as a result of a

discriminatory discharge and of furthering the public interest in deterring such discharges.").

There must be “discrimination.” Section 8(a)(3) refers to discrimination, not present here, related to labor organizations. Section 8(a)(4) refers to discrimination, not present here, related to filing charges or giving testimony. There are no other examples of discrimination in the statute; significantly here, there is no reference to discrimination in Section 8(a)(1). The Court must interpret the statute as written. “Only when following the literal language of the statute would lead to ‘an interpretation which is inconsistent with the legislative intent or to an absurd result’ can a court modify the meaning of the statutory language.” *Tenn. Prot. & Advoc., Inc. v. Wells*, 371 F.3d 342, 350 (6th Cir. 2004).

In case involving Section 8(a)(3), for example, an employer can be liable for terminating an employee “in response to the employee’s union activities or membership.” *Norton Healthcare, Inc. v. NLRB*, 156 F. App’x 745, 751 (6th Cir. 2005) (citing *NLRB v. Oberle-Jordre Co.*, 777 F.2d 1119, 1120-21 (6th Cir. 1985)). In a Section 8(a)(4) case, the employer may be liable for “disproportionate or otherwise retaliatory discipline” resulting from the employee’s filing of charges. *Airgas USA, LLC v. NLRB*, 916 F.3d 555 (6th Cir. 2019).

In such a case, the Court follows the standard established in *Wright Line*, 251 N.L.R.B. 1083 (1980), and approved by the Supreme Court in *NLRB v.*

Transportation Management Corp., 462 U.S. 393, 401 (1983). Under the *Wright Line* framework, "the General Counsel has the initial burden of persuading the Board that anti-union sentiment was a motivating factor in the discharge." *Norton Healthcare, Inc.*, 156 F. App'x at 752 (citing *NLRB v. Taylor Mach. Prods., Inc.*, 136 F.3d 507, 514-15 (6th Cir. 1998)). To do so, "the General Counsel must demonstrate...(1) [that] the employee was engaged in protected activity; (2) that the employer knew of the employee's protected activity; and (3) that the employer acted as it did on the basis of anti-union animus." *Airgas USA, LLC*, 916 F.3d at 561. In short, an action under Section 8(a)(3) or (4), which expressly prohibit "discrimination," requires proof of causation.

The statutory framework does not support General Counsel's position. The pre-*Epic Systems* NLRB decisions do not help General Counsel either. *Denson Electric* and *Kolkka Tables* both address adverse employment decisions that flow out of an employee's refusal to disassociate with a union. Both cases have underlying facts involving some *causal connection* between protected concerted activity and an adverse employment action, which is not the case here.

In *SF Markets*, the Board found a violation of Section 8(a)(1) when an employer threatened to discharge an employee for refusing to agree to an allegedly unlawful agreement, overbroadly citing *Denson Electric*. The Board did not analyze the statutory language. Regardless of the lack of analysis, *SF Markets* does

not help General Counsel because the Fifth Circuit granted summary reversal. The case was only reported at 2016 WL 6804352. General Counsel's Petition for a Writ of Certiorari was denied. <https://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-sf-markets-l-l-c/>

In the recent *Alorica* case, the ALJ's decision also relied on *SF Markets*, incorrectly noting that the Fifth Circuit had affirmed. The NLRB added reliance on *Deep Distributors of Greater NY d/b/a The Imperial Sales, Inc.*, 365 NLRB No. 95 (2017), enfd. mem. 740 Fed. Appx. 216 (2d Cir. 2018). In that case, the employee refused to sign an unlawful work rule, creating a violation of Section 8(a)(3) as well as (1). Thus, it appears that there has not been a fulsome analysis of the specific scenario present in this case by the NLRB, and certainly never by a Court.

In this case, the four former employees did not exercise or try to protect any Section 7 rights. For at least Mr. Salzer and Mr. Bartolucci, the primary concern prompting them not to sign was a *lawful* non-competition restraint. Mr. Walker requested a conversation with MCPB, which MCPB facilitated with legal counsel. Following that meeting, MCPB believed it had addressed Mr. Walker's questions and there were no additional efforts made to request modification or otherwise discuss the terms of the employment documents. Ms. Tilmon's text messages make it clear that she actually welcomed being fired once she said she would not sign the employment documents.

Thus, even if there were problems with MCPB's employment documents, there was no "discrimination" and no causal connection to the termination. All four employees were fired "for cause" – refusing to sign new employment agreements. Section 10(c) provides, in relevant part, "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause." See *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464, 475, 74 S.Ct. 172 (1953)("insubordination, disobedience or disloyalty is adequate cause for discharge...").

It is worth considering this argument in the broadest sense. Assume Mr. Salzer refused to sign the Employment Agreement because, as General Counsel suggested as a hypothetical, he did not like the print. Assume he knew he could be fired, he did not mind being fired, and he was fired. Assume the only potential flaw in the Employment Agreement was the vague reference to non-solicitation, which had nothing to do with Mr. Salzer and was never actually enforced against anyone. Assume Mr. Salzer filed a charge with the NLRB, which, in conducting an investigation, found that the print was fine. But assume that, when reading the Employment Agreement, General Counsel read and then pursued a claim based on the non-solicitation language (despite the lack of such language in the Contract). In

this situation, MCPB might expect an enforcement action requiring it to clarify the non-solicitation language. But there is no coherent policy that is served by also extracting a monetary penalty.

6. The NLRB and ALJ Erroneously Concluded that Bartolucci and Salzer Were Entitled to Backpay as Alleged Discriminatees, Without Having Timely Filed a Charge

The limitations period is six months after the alleged unlawful labor practice. 29 U.S.C. §160(b). "The intended purpose of [§ 160(b)] is that, in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than six months before." *Don Lee Distrib. Inc. v. NLRB*, 145 F.3d 834, 844-45 (6th Cir. 1998); *see also NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 n.9; 79 S.Ct. 1179 (1959) ("This limitation extinguishes liability for unfair labor practices committed more than six months prior to the filing of the charge.").

As to Mr. Bartolucci and Mr. Salzer, the allegedly unfair labor practice occurred when they were told they were terminated in mid-February. (Record, pp. 84, 86, 95-96, 111, 188-189). *See Armco, Inc. v. NLRB*, 832 F.2d 357, 362 (6th Cir.1987), *cert. denied*, 486 U.S. 1042, 108 S.Ct. 2034 (1988). Therefore, each allegation of unlawful discharge must have been raised in an NLRB charge within the applicable statutory limitation period. *See Ledbetter v. Goodyear Tire &*

Rubber Co., 550 U.S. 618; 127 S. Ct. 2162, 2166 (2007) (applying this rationale to the filing of EEOC charges). At the latest, this would be August 27, 2016.

Yet neither Mr. Bartolucci nor Mr. Salzer filed a charge. Ever. Rather, their names were first mentioned in the Second Amended Charge filed by Ms. Tilmon and Mr. Walker on September 15, 2016. (Record, pp. 187-189). Despite the fact that they had missed the deadline by then, the NLRB and ALJ decided that Mr. Bartolucci and Mr. Salzer could join in this Complaint as Alleged Discriminatees under the *Redd-I* analysis. JD-66-18 at 25 (Record, p. 368). See *Redd-I, Inc.*, 290 N.L.R.B. 1115, 1118 (1988). This analysis looks at the nature of an amended charge using a three-prong analysis. See *Charter Communications, Inc. v. N.L.R.B.*, 939 F.3d 798 (6th Cir. 2019). Typically, an amendment would entail additional factual allegations by the original charging parties, *not* the naming of new charging parties who had missed their deadline.

Therefore, the precise question for the Court is: can *Redd-I* be read consistently with the statute and case law if the NLRB is allowed to impose monetary liability after such liability was extinguished? MCPB suggests the answer is no. The NLRB's and ALJ's reading of *Redd-I* would eviscerate the statutory six-month limitation period, and there is no case anywhere supporting that reading.

CONCLUSION AND RELIEF REQUESTED

MCPB requests that the NLRB Decision be reversed and vacated, or for such other relief as the Court deems proper.

Respectfully submitted,
FRANK & FRANK LAW

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Dated: January 5, 2021

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the attorneys of record of all parties in the above cause electronically, in accordance with Fed.R.Civ.P. 5(d) on the 5th day of January, 2021.

/s/
Amy Zielinski

CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a)(7)(c), the undersigned certifies this brief complies with the type-volume limitations of 6th Cir. R. 32(a)(7)(B).

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