

Nos. 20-1730, 20-1854

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

MOTOR CITY PAWN BROKERS INC.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

**PATRICIA TILMON, TERRENCE WALKER, and
GIANLUCA BARTOLUCCI**
Intervenors

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes oral argument would be helpful in evaluating the legal issues presented in this case.

STATEMENT OF JURISDICTION

This case is before the Court on Motor City Pawn Brokers Inc.'s petition to review, and the National Labor Relations Board's cross-application to enforce, a

Board Order issued against Motor City on July 24, 2020. (369 NLRB No. 132).

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act” or “NLRA”), 29 U.S.C. § 160(a), and the Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f), 29 U.S.C. § 160(e) and (f). The petition and cross-application were timely, as the Act provides no time limits for such filings.

STATEMENT OF THE ISSUES

1. Did the Board reasonably find that Motor City violated the Act by maintaining unlawful arbitration, solicitation and association, confidentiality, and indemnity policies?

2. Did the Board reasonably find that Motor City violated the Act by discharging Patricia Tilmon, Terrence Walker, Gianluca Bartolucci, and Ringo Salzer for failing to sign documents containing the unlawful policies?

STATEMENT OF THE CASE

I. THE BOARD’S FINDINGS OF FACT

A. Motor City Requires Employees To Sign New Employment Documents

Motor City operates four pawn shops in the Detroit area. In early February 2016, Motor City provided all employees with a new Employment Agreement. Around the same time, Motor City issued an employee handbook and an accompanying document titled Contract Between the Company and Employee and

Employee Handbook Receipt (the “Contract and Receipt”). The handbook contained information regarding workplace policies and procedures, on topics ranging from compensation to discipline to work schedules. (R. 550; R. 28, 41-42, 217-69.)¹

Employees were required to sign the Employment Agreement and the Contract and Receipt as a condition of continued employment. Motor City informed employees that they would be discharged for not signing. Motor City subsequently circulated an updated handbook that contained the same provisions at issue in this case. (R. 550; R. 58, 66-67, 102-03, 290-343.)

B. Motor City Requires Arbitration of All Employment Claims

The Employment Agreement and the Contract and Receipt both contain arbitration clauses. The Employment Agreement provides that:

[A]ny ... claims that Employee may assert against Employer, including, without limitation, any claim ... alleging a violation of ... the National Labor Relations Act ... shall be determined and settled by arbitration in the City of Southfield, in accordance with the Employment Arbitration Rules of the American Arbitration Association

(R. 552; R. 220.)

The Contract and Receipt provides that:

[I]f a dispute arises concerning my employment with and/or termination by Company the exclusive method for resolving the dispute

¹ “R.” cites are to the Certified Agency Record. Citations preceding a semicolon are to the Board’s findings in its Decision and Order; cites following a semicolon are to supporting evidence in the record.

arising out of employment or in any way related to any alleged wrongful acts on the part of Company ... relating to employment, including but not limited to, any claim for wages or fringe benefits, claims of breach of contract, wrongful discharge, tort claims, invasion of privacy, slander, defamation, and/or any statutory claim including but not limited to discrimination under Title VII of the Federal Civil Rights Act, Age Discrimination in Employment Act, Americans With Disabilities Act or Family Medical Leave Act, the Michigan Elliot-Larson Civil Rights Act, Persons With Disabilities Act, Whistle Blowers Protection Act and Bullard-Plawecki Employee Right to Know Act shall be through the procedures and policies of the American Arbitration Association (“AAA”) utilizing a single arbitrator. I hereby waive my right to adjudicate any claim against the Company Parties before any federal or state court or agency.

(R. 553; R. 223.)

C. Motor City Prohibits Solicitation and Association

The Employment Agreement includes rules related to employee solicitation and association. It provides that:

Employee shall not employ or Solicit any Employees, Solicit for purposes of employment or association, and/or induce any Employees to terminate such employment or association, or otherwise engage any Employees or permit such engagement

(R. 557; R. 219.) The same subsection contains the following definitions:

“Prohibited Association” means any and all situations whereby Employee is acting directly or indirectly, for Employee’s own benefit or for the benefit of any other person, firm, or business organization, or as a partner, stockholder, officer, director, proprietor, employee, consultant, representative, independent contractor, agent of a third party, member and/or manager including, without limitation, through any entity or person.

“Solicit” shall mean any contact, communication, dialogue, or undertaking whether the same is initiated by Employee or by any former or current employee, independent contractor, customer, or

referral source of Employer and/or Related Entities ... , whether for business, employment, retention, social or other purposes.

(R. 557; R. 219.)

The handbook includes “solicitation of fellow employees on the Company premises” in its list of “prohibited activities.” It explains that engaging in prohibited activities can result in discipline, including termination. (R. 557; R. 234-35.)

D. Motor City Designates the Handbook as Confidential

The Foreword to the handbook instructs employees to treat the handbook itself as confidential:

The information contained in this handbook is strictly limited to use by the Motor City Pawn Brokers’ employees. The disclosure of this handbook to competitors is prohibited. Making an unauthorized disclosure of this handbook is a serious breach of the Motor City Pawn Brokers’ standards of conduct and ethics and shall expose the disclosing party to disciplinary action and other liabilities as permitted under law. This handbook and the information in it should be treated as confidential.

(R. 555-56; R. 231-32.)

E. Motor City Requires Employees To Indemnify It for Any Costs Related to Breach of the Employment Documents

The Employment Agreement provides that an employee will indemnify Motor City for all expenses related to breach of the Employment Agreement:

Employee shall unconditionally and absolutely indemnify, defend and save harmless Employer from and against any and all claims, causes of action, demands, damages, liabilities, costs, actual attorneys’ fees, losses, and expenses of every nature and kind whatsoever that in any way relate to Employee’s breach of this Agreement and/or the

addenda/offer letter attached hereto, intentional acts, and/or negligence (the “Liabilities”). Employee agrees to advance to Employer all costs, actual attorneys’ fees, actual experts’ fees, and similarly related expenses arising from the Liabilities immediately upon request

(R. 554; R. 220-21.).

The Contract and Receipt further explains that:

The Company may file a suit in equity to enforce the terms and provisions hereof by obtaining the issuance of an injunction or ex-parte restraining order to enjoin and prohibit me from such breach or threatened breach hereof.

(R. 554; R. 223.)

F. Motor City Discharges Four Employees Who Declined To Sign the Employment Agreement or Contract and Receipt

Patricia Tilmon, Terrence Walker, Gianluca Bartolucci, and Ringo Salzer worked as pawn brokers at Motor City. They declined to sign the Employment Agreement or the Contract and Receipt. Motor City discharged the four employees for failing to sign those documents. Salzer was discharged on February 16, Tilmon on February 24, Bartolucci on February 27, and Walker on March 8. (R. 550; R. 33-34, 47, 70, 84-85, 93, 103.)

II. PROCEDURAL HISTORY

Tilmon and Walker filed unfair-labor-practice charges with the Board on July 1, 2016, alleging that Motor City maintained a variety of unlawful work rules and illegally discharged them for refusing to sign the Employment Agreement. On September 15, Tilmon filed an amended charge that further alleged that Motor City also unlawfully discharged Bartolucci and Salzer for refusing to sign the

Employment Agreement. Based on those charges, the Board's General Counsel issued a complaint alleging that Motor City violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by maintaining certain rules and provisions in the Employment Agreement, Contract and Receipt, and handbook, and by discharging Tilmon, Walker, Bartolucci, and Salzer for refusing to sign those documents. Following a hearing, an administrative law judge found multiple violations as alleged and dismissed others.

III. THE BOARD'S CONCLUSIONS AND ORDER

On July 24, 2020, the Board (Chairman Ring; Members Kaplan and Emanuel) issued a Decision and Order finding that Motor City violated Section 8(a)(1) of the Act by maintaining (1) an arbitration policy that interferes with employees' right to file charges with the Board; (2) rules restricting association with and solicitation of other employees; (3) the rule prohibiting unauthorized disclosure of the handbook; and (4) the indemnity provisions in the Employment Agreement and the Contract and Receipt. The Board also found that Motor City violated Section 8(a)(1) by discharging Tilmon, Walker, Bartolucci, and Salzer.²

² The Board reversed the judge's findings of other violations and dismissed those allegations. It also severed one allegation and asked the parties to address whether the allegation should be remanded to the judge for further consideration. Neither the dismissals nor the severed matter is at issue on appeal.

The Board ordered Motor City to cease and desist from the unfair labor practices found and from any like or related interference with employees' rights. Affirmatively, the Board ordered Motor City to rescind or revise the rules and provisions found unlawful and to furnish employees with revised versions of the Employment Agreement, Contract and Receipt, and handbook or inserts for those documents containing revised provisions or advising that the unlawful provisions had been rescinded. The Order also directs Motor City to offer to reinstate Tilmon, Walker, Bartolucci, and Salzer, make them whole for any loss of earnings or other benefits, and remove from its records any reference to their discharges. It also requires Motor City to post a remedial notice.

STANDARD OF REVIEW

The Court's "review of the Board's decision is quite limited." *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 542 (6th Cir. 2016) (internal quotation omitted). The Court will enforce a Board order where "the Board's findings are reasonable and supported by substantial evidence." *Kessel Food Markets, Inc. v. NLRB*, 868 F.2d 881, 883 (6th Cir. 1989). The Board's "factual findings and its application of the law to those facts are conclusive 'if supported by substantial evidence on the record considered as a whole.'" *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 304 (6th Cir. 2012) (quoting 29 U.S.C. § 160(e)). The Court will "uphold the Board's interpretation of the Act as long as it is a permissible

construction of the statute.” *Id.* (internal quotation omitted.) When a case involves the balancing of workplace interests, “[i]t is the primary responsibility of the Board and not of the courts to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.” *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (internal quotation omitted).

SUMMARY OF ARGUMENT

Applying settled law to uncontested facts, the Board reasonably concluded that Motor City violated the Act by maintaining a series of unlawful workplace policies and discharging employees for refusing to accept those policies. Motor City’s arbitration, solicitation and association, confidentiality, and indemnity policies are each unlawful under established precedent. The arbitration policy is facially unlawful because it explicitly restricts employees’ right to bring unfair-labor-practice charges to the Board. Motor City’s broad ban on solicitation and association is not limited to particular times or particular topics and directly interferes with employees’ right to organize, rendering it presumptively invalid. Motor City’s designation of the employee handbook and all information therein as confidential would preclude employees from discussing terms and conditions of employment. The indemnity policy burdens employee rights by placing employees on the hook, financially and legally, for protected activity and for any breach of the

other unlawful policies. Even though the confidentiality and indemnity policies are facially neutral, Motor City failed to provide legitimate business justifications that would outweigh those policies' interference with employee rights.

Just as Motor City violated the Act by maintaining the unlawful policies, it unlawfully discharged four employees who refused to accept them. Court and Board precedent confirms that discharging an employee for failing to accept unlawful policies is itself unlawful. Such discharges violate the Act because they would permit employers to give effect to unlawful policies and enforce unlawful conditions of employment. Motor City's arguments to the contrary ignore statutory language, precedent, and logic, and cannot overcome the Board's expertise in crafting and enforcing federal labor law.

ARGUMENT

The Board reasonably determined that Motor City maintained four workplace policies that were clearly unlawful under well-settled law. Because the policies were themselves unlawful, Motor City could not give effect to those policies by discharging employees for refusing to accept them.

I. Motor City Maintained Unlawful Arbitration, Solicitation and Association, Confidentiality, and Indemnity Policies

A. Maintenance of Workplace Policies That Would Limit Employees' Rights Violates the Act

Section 7 of the Act grants employees the right to “engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection,” 29 U.S.C. § 157, and Section 8(a)(1) prohibits employer actions that “interfere with, restrain, or coerce employees in the exercise of” those rights, 29 U.S.C. § 158(a)(1). An employer thus violates Section 8(a)(1) by maintaining a rule or policy that expressly restricts employees’ statutory rights. *PAE Applied Techs., LLC*, 367 NLRB No. 105, 2019 WL 1116084, at *3 n.6 (2019). Even absent an express restriction, a facially neutral policy also may violate the Act. To determine the legality of such a policy, the Board first considers whether the policy, “when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.” *Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495, at *4 (2017). If so, the Board will balance the nature and extent of the policy’s potential

impact on employee rights with the employer's asserted business justification for the policy. *Id.*

A rule or policy need not be enforced to violate the Act; the “maintenance” of a policy restricting Section 7 rights, or reasonably understood as restricting such rights (without countervailing employer interests), is an unfair labor practice. *Id.* at *5, 17; *see also Beverly Health & Rehab. Servs., Inc.*, 332 NLRB 347, 349 (2000) (explaining that “merely maintaining an overly broad rule violates the Act”), *enforced*, 297 F.3d 468 (6th Cir. 2002); *J.C. Penney Co.*, 266 NLRB 1223, 1224-25 (1983) (same). As this Court has explained, “[b]ecause of the likely chilling effect of such a rule, the Board may conclude that the rule was an unfair labor practice even absent evidence of enforcement.” *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 539 (6th Cir. 2000) (internal quotation omitted).

The “when reasonably interpreted” standard is an objective inquiry, looking only to the text of the rule or policy and viewing it from a reasonable employee's perspective. *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, 2019 WL 2525342, at *9 n.14 (2019); *Boeing*, 2017 WL 6403495, at *4, 17. Whether the rule actually has operated to restrict employees' rights is irrelevant to the analysis, as is the subjective understanding of any particular employee. *Prime Healthcare*, 2019 WL 2525342, at *9 n.14; *see also Charter Commc'ns, Inc. v. NLRB*, 939 F.3d 798, 809 (6th Cir. 2019) (explaining that “[a]ctual coercion is

unnecessary” to find Section 8(a)(1) violation); *Main St. Terrace*, 218 F.3d at 539 (“[W]e are not concerned with the subjective impact of the rule on particular employees.” (internal quotation omitted)). The analysis “looks solely to the wording of the provisions at issue, not to the employer’s or employee’s conduct.” *E.A. Renfroe & Co.*, 368 NLRB No. 147, 2019 WL 6840794, at *5 (2019), *application for enforcement pending*, 11th Cir. No. 20-13027.

Because rules are “interpreted from the employees’ perspective,” *Prime Healthcare*, 2019 WL 2525342, at *9 n.14, the employer’s subjective understanding of its policy does not determine the policy’s legality. A workplace rule that would interfere with protected activity is unlawful “even if the [employer] did not intend the rule to reach those areas.” *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999); *see also NLRB v. Inter-Disciplinary Advantage, Inc.*, 312 F. App’x 737, 744 (6th Cir. 2008) (rejecting employer’s limited reading of rule because the “rule contains no such limitation”).

Motor City is incorrect that the Board will adopt the employer’s understanding of a rule so long as it is “plausible” or “arguable.” (Br. 12.) That principle is nowhere to be found in the Board’s work-rule jurisprudence. Motor City imports that concept from an unrelated line of cases dealing with an employer’s duty to bargain under Section 8(a)(5) of the Act. The cases that Motor

City cites (Br. 12) dealt with the distinct issue of whether provisions in a collective-bargaining agreement permitted the employer to act unilaterally or otherwise provided a defense to an allegation that the employer unlawfully refused to bargain with its employees' union. *See NCR Corp.* 271 NLRB 1212, 1213 (1984) (whether contract permitted employer's unilateral transfer of work); *FSI*, 355 NLRB 606, 606-07 (2010) (whether contract required employer to recognize union). No such issue is presented here.

If employees reasonably would understand a facially neutral rule as interfering with Section 7 rights, the rule is unlawful unless the interference is outweighed by the employer's business justification for the rule. *Boeing*, 2017 WL 6403495, at *4. Applying that balancing test over time, the Board will develop a taxonomy of different types of rules.³ Motor City's various assertions about what *Boeing* "category" its policies should belong to (Br. 16, 18-20, 23) are premised on misunderstandings of the *Boeing* test and its application to this case, however. First, the *Boeing* balancing test applies only to facially neutral workplace rules, not policies that, like Motor City's arbitration, solicitation, and association rules, expressly or directly restrict Section 7 rights. Second, the categorization of rules is

³ Rules in Category 1 are lawful, either because they do not interfere with Section 7 rights or any interference is outweighed by employer interests. *Id.* Rules in Category 2 require individualized analysis and balancing in each case. *Id.* Category 3 rules are per se unlawful, with no possible justification. *Id.*

a result of the analysis, not part of the analysis itself. *Boeing*, 2017 WL 6403495, at *5. Motor City’s statements thus are no substitute for the necessary evaluation of its policies’ impact on Section 7 rights. Only after determining whether a facially neutral policy is lawful does the Board place it in a category. To the extent Motor City is arguing that its policies are “Category 1” because they do not interfere with Section 7 rights, those arguments are wrong for the reasons detailed in the following sections.

B. Motor City’s Arbitration Policy Unlawfully Restricts Employees’ Access to the Board

1. Employers Violate the Act by Maintaining Policies That Prevent Employees from Filing Board Charges

Employees have the right to access the Board and its processes, including the “statutory right to file charges with the Board.” *U-Haul Co. of Cal.*, 347 NLRB 375, 388 (2006), *enforced mem.*, 255 F. App’x 527 (D.C. Cir. 2007); *see also Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 740 (1983) (describing employees’ “right to utilize the Board’s processes”); *Kinder-Care Learning Ctrs., Inc.*, 299 NLRB 1171, 1172 (1990) (describing “the statutory right of employees to communicate their employment-related complaints to ... the Board”). Congress granted wide protection to employee participation in the Board process. *See NLRB v. Scrivener*, 405 U.S. 117, 121-22 (1972) (discussing employees’ “complete freedom” to engage with the Board).

Further, employees' right to access the Board is crucial to the functioning of the Board and the effectuation of the Act. The Board cannot initiate unfair-labor-practice proceedings itself, but depends upon the filing of a charge by a private party. *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 235 (1967). As the Supreme Court has explained, "[i]mplementation of the Act is dependent upon the initiative of individual persons who must ... invoke its sanctions through filing an unfair labor practice charge." *Id.* at 238. The Act also makes the Board process the exclusive means of enforcement. Under Section 10(a) of the Act, the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. § 160(a). Employees' ability to access the Board is thus both "needed to preserve the integrity of the Board process," *Scrivener*, 405 U.S. at 124, and "important in the functioning of the Act as an organic whole," *NLRB v. Indus. Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968).

An employer's interference with the right to file Board charges violates Section 8(a)(1). *Prime Healthcare*, 2019 WL 2525342, at *7; *U-Haul*, 347 NLRB at 388; *see also Nash*, 389 U.S. at 238 (explaining that "it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges"); *Beverly Health*, 297 F.3d at 478 (unlawful to maintain rules that "discourage employees from ... filing charges"). Accordingly, courts and the

Board consistently have held that employer policies (including arbitration policies) that prohibit, or that employees reasonably would interpret as prohibiting, employees from filing unfair-labor-practice charges with the Board are unlawful. *Prime Healthcare*, 2019 WL 2525342, at *9-10; *see also Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 777-78 (8th Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1019 (5th Cir. 2015), *affirmed on other grounds*, 138 S. Ct. 1612 (2018); *Alorica, Inc.*, 368 NLRB No. 25, 2019 WL 3386283, at *2 (2019); *U-Haul*, 347 NLRB at 388.

2. Motor City’s Arbitration Policy Interferes with Employees’ Right To File Board Charges

The Board reasonably determined that Motor City’s maintenance of the arbitration policy in its Employment Agreement and Contract and Receipt violated the Act. Motor City does not—and could not—challenge the foundational propositions that the Act grants employees the right to file Board charges and that an employer’s interference with that right violates Section 8(a)(1). Those principles apply squarely here.

Motor City’s arbitration policy interferes with employees’ right to file charges with the Board. The Employment Agreement expressly provides that “any claim ... alleging a violation of ... the National Labor Relations Act” must go to arbitration. (R. 220.) The Contract and Receipt likewise mandates arbitration as the “exclusive method” for resolving disputes “arising out of employment or in any

way related to any alleged wrongful acts on the part of Company ... relating to employment.” (R. 223.) It sweeps broadly, covering “any statutory claim.” (R. 223.) That description applies to NLRA claims, which are statutory claims that relate to employment. Moreover, the Contract and Receipt requires employees to “waive my right to adjudicate any claim against the Company Parties before any federal ... agency.” (R. 223.) That waiver clearly encompasses NLRA claims, which must be brought before a federal agency. *See, e.g., E.A. Renfro*, 2019 WL 6840794, at *1 (unlawful policy required arbitration of “all Claims in a federal ... agency under applicable federal ... laws, arising out of or relating to Employee’s employment”). The Employment Agreement and the Contract and Receipt thus mandate arbitration as the only available forum for NLRA claims.

Motor City contends that employees would not understand its policy as restricting Board access because it covers “claims” rather than the statutory term unfair-labor-practice “charges.” (Br. 16.) Such fine parsing of the language does not render the policy lawful. The relevant standard for evaluating the legality of a workplace policy is that of a reasonable employee, not a legal expert. *Prime Healthcare*, 2019 WL 2525342, at *9 n.12. The vindication of employees’ rights cannot depend on them knowing that a filing with the Board is described in the NLRA as a “charge” rather than a “claim.” Employees “cannot be expected to understand the nuances of the National Labor Relations Act” when evaluating the

scope of a workplace rule. *Jurys Boston Hotel*, 356 NLRB 927, 942 (2011); *see also Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994) (“Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules . . . , and cannot be expected to have the expertise to examine company rules from a legal standpoint.”).

Because Motor City’s arbitration policy expressly prohibits employees from filing Board charges, it is facially unlawful. *See Prime Healthcare*, 2019 WL 2525342, at *8 (holding that “an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful” as “an explicit prohibition on the exercise of employee rights under the Act”). Accordingly, as the Board explained (R. 539 n.4, 553), there is no need to consider any purported justifications for the policy or engage in balancing. Indeed, the Board held in *Prime Healthcare* that, as a matter of law, there is no legitimate business justification for policies restricting employees’ right to file Board charges. 2019 WL 2525342, at *10. Employees’ ability to access the Board is so fundamental to the effectuation of the Act’s purposes and protections that no purported business justification can outweigh it. As the Board put it, “[a]ny contention that a restriction on filing unfair labor practice charges with the Board is supported by legitimate justifications must be rejected as contrary to the judgment and intent of Congress.” *Id.* For example, Motor City cannot override the

statutory scheme Congress established for protecting employee rights by resort to interests like “efficiency” (Br. 18). *See Prime Healthcare*, 2019 WL 2525342, at *10 n.15 (noting that “any claim that such considerations justify a restriction on charge filing would be contrary to ... the Act”); *Alorica*, 2019 WL 3386283, at *2 (rejecting argument that policy’s interference with Section 7 rights was “outweighed by the efficient resolution of workplace disputes”).

For the first time on appeal, Motor City contends that the Federal Arbitration Act mandates enforcement of its arbitration policy. (Br. 14-16.) That argument is jurisdictionally barred, however, because Motor City did not raise it to the Board and “[n]o objection that has not been urged before the Board ... shall be considered by the court” absent “extraordinary circumstances.” 29 U.S.C. § 160(e). Reviewing courts are “without jurisdiction to consider [a] question ... not raised during the proceedings before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). In such circumstances, “judicial review is barred.” *Id.*; *see also Wal-Mart Stores, Inc. v. NLRB*, 136 F. App’x 752, 755 (6th Cir. 2005) (consideration of “theory ... raise[d] for the first time in this appeal ... is barred”).

In any event, although the Federal Arbitration Act generally provides for the enforcement of arbitration agreements, that enforcement mandate can be “overridden by a contrary congressional command.” *Shearson/Am. Express, Inc. v.*

McMahon, 482 U.S. 220, 226 (1987). As the Board held in *Prime Healthcare*, 2019 WL 2525342, at *8, Section 10(a) of the NLRA embodies such a command in its provision that the Board’s power to prevent unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement,” 29 U.S.C. § 160(a). Accordingly, “the FAA does not authorize the maintenance ... of agreements that interfere with an employee’s right to file charges with the Board.” *Prime Healthcare*, 2019 WL 2525342, at *8. Courts, too, have invoked that provision in finding arbitration policies that would restrict access to the Board unlawful. *See Cellular Sales*, 824 F.3d at 777 (explaining that Section 10(a) “prohibits an employer from entering into an agreement with employees that circumscribes the Board’s authority to prevent unfair labor practices”); *Murphy Oil*, 808 F.3d at 1019 (citing Section 10(a) in holding that Board’s adjudicatory power “cannot be limited by an agreement between employees and the employer”). Motor City has forfeited, by failing to raise it in its opening brief to the court, any challenge to the principle that Section 10(a) constitutes a contrary command. *See Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 624 (6th Cir. 2013) (“[A]rguments not raised in a party’s opening brief ... are waived.”).

Finally, contrary to Motor City’s suggestion (Br. 17), the Board need not show that the arbitration policy actually operated in practice to prevent employees

from filing Board charges. As explained above, p. 12, the maintenance of a rule restricting NLRA rights is unlawful, even if it is not enforced. Motor City ignores the “chilling effect” of such a rule on employee rights. *Main St. Terrace*, 218 F.3d at 539. It is Motor City’s maintenance of the arbitration policy in the Employment Agreement and Contract and Receipt that violates the Act.

C. Motor City’s Solicitation and Association Rules Are Unlawful

The Act’s guarantee of employees’ right to engage in concerted activity “necessarily encompasses the right effectively to communicate with one another ... at the jobsite.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). The effectiveness of the right to organize “depends ... on the ability of employees to learn the advantages and disadvantages of organization from others.” *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Employees thus have the right to communicate with each other and to attempt to convince fellow employees to join together in common cause. *See, e.g., NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 374 F.2d 147, 153 (6th Cir. 1967) (discussing “employees’ right to ... solicit union interest among themselves on company property”); *accord Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003) (emphasizing that “Section 7 protect[s] employee rights to solicit fellow employees”). On the other hand, employers have an interest in maintaining order and discipline in the workplace.

With Supreme Court approval, the Board long ago struck a balance between employee rights and employer interests in this area. Under *Republic Aviation Corp. v. NLRB*, a rule restricting solicitation during working time is presumptively lawful. 324 U.S. 793, 803 n.10 (1945). By contrast, “a rule prohibiting union solicitation by an employee outside of working hours, although on company property, ... [is] an unreasonable impediment to the exercise of the right to self-organization” and is thus presumptively unlawful. *Id.* at 802-03 & n.8 (internal quotation omitted). Accordingly, “[a] company rule which precludes solicitation ... at any time, including during nonworking hours in nonworking areas, is presumptively unreasonable.” *NLRB v. Arrow Molded Plastics, Inc.*, 653 F.2d 280, 284 (6th Cir. 1981); *see also Great Lakes Steel v. NLRB*, 625 F.2d 131, 132 (6th Cir. 1980) (explaining that “a rule prohibiting solicitation during nonworking hours must be presumed to be an unreasonable impediment to self-organization”). An employer seeking to rebut that presumption must show that “special circumstances” justify the restriction. *Republic Aviation*, 324 U.S. at 803 n.10.

Under those longstanding principles, the Board reasonably found that Motor City’s solicitation and association policies are unlawful. The no-solicitation policy in the Employment Agreement is an unqualified prohibition on employees’ ability to “solicit any employees” including “for purposes of ... association.” (R. 219.) It covers “any contact, communication, dialogue, or undertaking ... whether for

business, employment, retention, social or other purposes.” (R. 219.) That sweeping prohibition would encompass protected organizing activity. The handbook’s ban is similarly all-encompassing, identifying “solicitation of fellow employees” as a “prohibited activity” that can result in termination. (R. 234-35.) The policy makes no distinction between working and non-working time. It is a blanket ban on employees soliciting fellow employees for any reason at any time. Under *Republic Aviation*, the policy is presumptively invalid.

Motor City’s association policy is similarly unlawful. The Employment Agreement prohibits an employee from associating with fellow employees “for [her] own benefit” or “for the benefit of any other ... employee.” (R. 219.) It covers “any and all situations” of such association. (R. 219.) Such a broad prohibition would encompass concerted activity to improve working conditions—the precise activity that the Act protects. The ban also prevents employees from acting as the “representative ... of a third party,” which would cover an employee’s organizing efforts on behalf of a union. (R. 219.) Like the no-solicitation rule, the prohibition on association is not limited to work time.

Because Motor City’s solicitation and association rules are presumptively invalid under *Republic Aviation*, no further balancing is necessary. As the Board explained (R. 539 n.5, 557), the *Republic Aviation* framework “already strikes a balance between employee rights and employer interests.” *UPMC*, 366 NLRB No.

142, 2018 WL 3738345, at *1 n.5 (2018). Motor City offers no special circumstances that would overcome the presumption of invalidity. Rather, it merely puts forward its own subjective understanding of the rules as limited to banning employees from soliciting other employees to quit and compete with Motor City. (Br. 22.) But Motor City's subjective intent is irrelevant to the analysis, *see* p. 13, and the "rule contains no such limitation," *Inter-Disciplinary Advantage*, 312 F. App'x at 744. Instead, as the Board explained, "the language of the no-solicitation rules is much broader than that, and clearly encompasses protected associational activities." (R. 557.) It covers "any contact ... or undertaking," not just for "employment" but also for all "other purposes." (R. 219.) The conclusion that the solicitation and association bans extend beyond efforts to compete with Motor City is driven home by the fact that, as the Board noted (R. 557), the Employment Agreement has a separate non-compete provision (R. 219) that serves to address that very scenario.

Finally, contrary to Motor City's suggestion (Br. 21), the *Republic Aviation* standard is not limited to express restrictions on "union solicitation." Indeed, the rule found unlawful in *Republic Aviation* itself stated broadly that "[s]oliciting of any type cannot be permitted in the factory or offices." 324 U.S. at 795; *see also NLRB v. S. Elecs. Co.*, 430 F.2d 1391, 1392 (6th Cir. 1970) (unlawful rule prohibited "solicitation of any kind on company property"). In any event, as

explained above, Motor City's no-solicitation rule is broad enough to cover union solicitation.

D. Motor City's Confidentiality Rule Regarding the Handbook Is Unlawfully Overbroad

Fundamental to employees' "right ... to communicate" is their right to discuss terms and conditions of employment, both among themselves and with third parties such as unions or the public. *Beth Israel*, 437 U.S. at 491; *see also Inter-Disciplinary Advantage*, 312 F. App'x at 744 (detailing employees' "right to freely discuss work-place conditions"). Employees have a right under the Act to discuss pay and benefits, for example. *Main St. Terrace*, 218 F.3d at 537-38; *Inter-Disciplinary Advantage*, 312 F. App'x at 744. Confidentiality rules that "prohibit[] employees from making statements concerning wages, hours, ... etc." thus violate the Act. *Main St. Terrace*, 218 F.3d at 539 (internal quotation omitted).

Motor City ran afoul of those principles by designating the "handbook and the information in it" as confidential in the handbook's foreword and prohibiting employees from disclosing it on penalty of discipline. (R. 231-32.) The handbook covers such quintessential terms and conditions of employment as benefits (R. 265), job appraisal and raises (R. 261), hours (R. 263-64), and discipline (R. 236-37). Motor City's prohibition on disclosure of such information directly offends Section 8(a)(1). As the Board has explained, an employer violates Section 8(a)(1)

by designating the entirety of its employee handbook confidential because “[e]mployees would reasonably interpret the [policy] to prohibit sharing the employee handbook or its terms and conditions with outside parties, such as unions.” *G&E Real Estate Mgmt. Servs., Inc.*, 369 NLRB No. 121, 2020 WL 4054557, at *6 (2020). Accordingly, the Board has found unlawful rules that listed handbooks as “proprietary/confidential information” that employees were forbidden from disclosing. *Quicken Loans, Inc.*, 359 NLRB 1201, 1201 n.3 (2013), *adopted*, 361 NLRB 904 (2014), *enforced*, 830 F.3d 542 (D.C. Cir. 2016); *see also Pac. Micronesia Corp.*, 337 NLRB 469, 485-86 (2002) (employer unlawfully designated “employee handbook” as “confidential information”). Because such documents “relate to wages, hours, and other terms and conditions of employment,” any “attempt to prohibit employees from disclosing these matters among themselves or to their bargaining representative is violative of Section 8(a)(1).” *Pac. Micronesia*, 337 NLRB at 486. That reasoning applies squarely here.

Motor City’s restriction on disclosing its handbook is distinct from the more targeted confidentiality rules in the Employment Agreement and elsewhere in the handbook that, as Motor City notes (Br. 20-21), the Board found lawful. Unlike those provisions, there is no indication that the scope of the prohibition on disclosing the handbook is limited to proprietary information. As the Board

explained, those other provisions were lawful because they provided “specific examples of obviously proprietary business information” when describing what type of information was confidential. (R. 543.) For example, the confidentiality provision in the Employment Agreement referred to items such as “intellectual property, data storage and custom design solutions” and “business methods, security methods” (R. 218) and the other handbook rule listed “credit card numbers, bank account information” and “marketing plans, costs, earnings, ... files, lists and medical files” (R. 251). The Board distinguished those rules from the type of broad, general language that employees would interpret as covering terms and conditions of employment. (R. 543.) By contrast, the blanket prohibition on sharing the “handbook and the information in it” contains no such context.⁴

Given the lack of context in the rule prohibiting handbook disclosure, the Board reasonably concluded that Motor City failed to establish that its interest in protecting proprietary information from competitors served as justification for such an overly broad confidentiality mandate. (R. 556.) Indeed, Motor City proffers no business interests in keeping the terms and conditions of employment in the

⁴ The Board also noted that, in addition to its specific examples of proprietary information, the other confidentiality rule in the handbook contained an express caveat that “this confidentiality policy” (R. 251) would not apply to restrict rights under the Act. (R. 543 n.12.) The rule deeming the handbook itself confidential contains no such carve out.

handbook confidential; it claims only that the unqualified prohibition on disclosure somehow does not cover that information. (Br. 21.) Because that argument is faulty for the reasons detailed above, the interference with Section 7 rights is not outweighed by any employer interest and maintenance of the confidentiality policy thus violates the Act. *Boeing*, 2017 WL 6403495, at *4.

E. Motor City’s Indemnity Policy Is Overbroad and Unlawfully Requires Employees To Pay the Costs of Enforcing Unlawful Policies

The illegality of Motor City’s indemnity provision follows both from the illegality of Motor City’s other policies and the indemnity policy’s own overbreadth. That policy makes employees financially responsible for any breach of the Employment Agreement and shifts the cost of enforcing that document to them. Employees would have to pay “all costs, actual attorneys’ fees, actual experts’ fees, and similarly related expenses” related to any effort to enforce the Employment Agreement. (R. 220.) Similarly, the Contract and Receipt subjects employees to legal risk, informing them that they would be the target of a lawsuit, injunction, or restraining order for failing to comply with its terms. (R. 223.) The Employment Agreement also makes employees liable for any costs or expenses “of every nature and kind whatsoever” that “in any way relate to Employee’s ... intentional acts.” (R. 220.)

The Board reasonably concluded that the indemnity policy burdens the exercise of Section 7 rights. By its terms, the indemnity policy would be triggered by an employee engaging in any of the activities that the Employment Agreement or Contract and Receipt unlawfully prohibit. An employee would risk financial and legal liability under that policy by filing a Board charge or soliciting a co-worker to join a union, for example. As the Board explained, employees thus reasonably would understand the indemnity policy as “placing a heavy financial burden” on their exercise of NLRA rights. (R. 555.) The risk of such liability serves to interfere with those rights, because a policy that “present[s] a threat of significant financial risk for engaging in protected, concerted activity” (R. 555) would tend to restrict such activity. Relatedly, the indemnity provision is invalid because it would “unlawfully require employees to defray [Motor City’s] costs of enforcing the unlawful arbitration agreement.” (R. 539.) The policy is similarly chilling in its own right, given its overbreadth. It puts employees on the hook for any costs to Motor City related to any “intentional acts,” which, as the Board noted, could include protected activity such as union organizing or strikes. (R. 555.)

As the Board explained (R. 555), Motor City proffered no justification that would outweigh the substantial interference with Section 7 activity posed by the indemnity policy’s threat of financial liability. Indeed, Motor City’s only stated

interest for the policy is its “right” to enforce the Employment Agreement and Contract and Receipt. (Br. 19.) Because those documents contain unlawful policies, however, Motor City’s interest in litigating their breach carries little weight. Moreover, the indemnity provision promotes the enforcement of policies, like Motor City’s arbitration policy, that have no business justification as a matter of law. The Board thus reasonably concluded (R. 555) that the indemnity provision itself can have no such justification.

II. Motor City Unlawfully Discharged Patricia Tilmon, Terrence Walker, Gianluca Bartolucci, and Ringo Salzer for Refusing To Sign Unlawful Policies

A. Employers Cannot Give Effect to Unlawful Policies by Discharging Employees Who Refuse To Accept Those Policies

Substantial evidence and longstanding precedent support the Board’s finding that Motor City unlawfully discharged Patricia Tilmon, Terrence Walker, Gianluca Bartolucci, and Ringo Salzer. Courts and the Board long have held that it is unlawful to discipline an employee for refusing to agree to an unlawful rule or policy. *See, e.g., NLRB v. Long Island Ass’n for AIDS Care, Inc.*, 870 F.3d 82, 88 (2d Cir. 2017); *NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 214-15 (4th Cir. 2005); *Alorica*, 2019 WL 3386283, at *6; *Denson Elec. Co.*, 133 NLRB 122, 131 (1961). Thus, “an employer may not take coercive action against an employee ... for refusing to comply with a policy that ... itself deters protected activity.” *Air Contact*, 403 F.3d at 214. That prohibition includes disciplining employees for

their “refusal[] to sign unlawful documents as a condition of employment.” *Long Island*, 870 F.3d at 88; *see also Deep Distribs. of Greater N.Y.*, 365 NLRB No. 95, 2017 WL 2666021, at *1-2 (2017) (unlawful to “discharg[e] an employee for refusing to consent to an unlawful rule”), *enforced*, 740 F. App’x 216 (2d Cir. 2018).

For example, an employer violates the Act by discharging an employee for “refus[ing] to sign ... unlawful arbitration agreements.” *Long Island*, 870 F.3d at 88; *see also Alorica*, 2019 WL 3386283, at *1 n.3; *E.A. Renfroe*, 2019 WL 6840794, at *5; *Everglades College, Inc.*, 368 NLRB No. 123, 2019 WL 6362437, at *7 (2019). Similarly unlawful is “terminat[ing] an employee for refusing to agree to an unlawful confidentiality agreement.” *Long Island*, 870 F.3d at 88. Unlawful solicitation rules likewise cannot serve as the basis for discipline or discharge. *See, e.g., Opryland Hotel*, 323 NLRB 723, 728 (1997) (“Any disciplinary action taken pursuant to an unlawful no-solicitation rule is likewise unlawful ...”); *cf. Republic Aviation*, 324 U.S. at 805 (“if a rule against solicitation is invalid,” so is “a discharge because of violation of that rule”).

Such discharges are unlawful because they would allow employers to give effect to an unlawful policy. Just as the maintenance of a policy that would interfere with Section 7 rights violates the Act, so does the de facto enforcement of that policy against employees who refuse to bind themselves to it. If the basis for

the discharge is unlawful, so is the discharge itself. The illegality of such discipline is “analogous to the ‘fruit-of-the-poisonous-tree’ metaphor often used in criminal law.” *Opryland Hotel*, 323 NLRB at 728. Similarly, as the Board explained here, such discharges constitute “unlawful enforcement of a condition of employment that required employees to sign the employment documents agreeing to the unlawful rules.” (R. 562.) An employer cannot “impose upon all of its employees [an] unlawful requirement . . . as a condition of employment,” *Denson Elec.*, 133 NLRB at 131, and thus cannot enforce that condition by discharging employees who fail to meet it.⁵

Under that well-settled principle, the four discharges violated the Act. For the reasons explained above, the Employment Agreement and the Contract and Receipt contained unlawful policies. And it is undisputed that Motor City discharged Tilmon, Walker, Bartolucci, and Salzer for failing to sign those

⁵ For similar reasons, courts and the Board have also found an unfair labor practice where employees were discharged for violating an unlawful rule. *See, e.g., Ne. Land Servs., Ltd. v. NLRB*, 645 F.3d 475, 484 (1st Cir. 2011) (“[D]ischarge pursuant to an unlawful rule is itself unlawful.”); *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1258 (10th Cir. 2005) (“disciplinary actions imposed pursuant to an unlawful rule are unlawful”); *NLRB v. McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 931 n.9 (5th Cir. 1993) (“[A] disciplinary action cannot stand where the primary justification for it is based on an unlawful rule.”). As discussed below, p. 37, although the discharged employees in those cases already were engaging in the protected activity that the unlawful rules prohibited, such activity is not required to find discipline pursuant to an invalid rule unlawful.

documents. Accordingly, Motor City “terminate[d] an employee for refusing to agree to an unlawful ... agreement,” and thus violated the Act. *Long Island*, 870 F.3d at 88. Motor City cannot escape that conclusion by labelling the refusal to sign “insubordination.” (Br. 8, 28.) The documents contained unlawful rules and “refusal to comply with unlawful rule[s] ... does not constitute insubordination justifying discipline.” *Kolkka Tables & Finnish-Am. Saunas*, 335 NLRB 844, 849 (2001). Nor were the discharges “for cause” under Section 10(c) of the Act. (Br. 28.) “Cause ... means the absence of a prohibited reason,” *Anheuser-Busch, Inc.*, 351 NLRB 644, 647 (2007) (internal quotation omitted), *review denied*, 303 F. App’x 899 (D.C. Cir. 2008), and the Act prohibits discharge for failing to accept unlawful policies.

Motor City advances several other arguments, but ultimately puts forward no reason to second guess the Board’s reading of Section 8(a)(1) to prohibit such conduct. Its various positions ignore precedent and misread the statute.

Motor City is incorrect that there was no causal connection between the unlawful policies and the discharges. (Br. 24-26.) Motor City’s reason for the adverse action is undisputed—the employees were discharged because they refused to sign documents that would have restricted their Section 7 rights. In such situations, causation has been established. Motor City’s “admission that it terminated [employees] for failing to comply with its signature policy with respect

to the unlawful [policies] establishes that [Motor City] had an improper motive, because an employer who takes coercive action against an employee for failing to comply with an unlawful policy violates § 8(a)(1).” *Air Contact*, 403 F.3d at 215.

Where an employer’s reason for the discharge is known, the *Wright Line* framework that Motor City describes (Br. 25-26), which the Board uses for determining motive, does not apply. *Id.*; *see also Ne. Land Servs.*, 645 F.3d at 484 (same).

Contrary to Motor City’s argument (Br. 27), the discharges were unlawful regardless of whether Tilmon, Walker, Bartolucci, and Salzer specifically objected to the unlawful provisions in the Employment Agreement or Contract and Receipt. As the Board explained, “[i]t was [Motor City’s] requirement that they sign the unlawful documents that caused their discharges to be unlawful, not the employees’ reasons for not signing them.” (R. 562.) Again, whether employer actions violate Section 8(a)(1) is an objective standard. Just as Motor City’s arbitration, solicitation and association, confidentiality, and indemnity policies are unlawful regardless of whether the employees subjectively believed them to be unlawful, *see pp.* 12-13, so is their discharge for not signing the Employment Agreement or Contract and Receipt unlawful regardless of whether they personally expressed concerns with the legality of those policies. As the Second Circuit put it, “that the employees have not ... protest[ed] the unlawful nature of the restriction

at issue does not make it any less unlawful.” *Long Island*, 870 F.3d at 89. Indeed, the court specifically rejected as “illogical and untenable” the argument that an “employee is only protected from the unlawful policy if he or she actively organizes ... against it.” *Id.*

In none of the Board or court cases articulating the principle that discharge for failing to sign an unlawful policy is itself unlawful did the analysis turn on whether the discharged employee had specifically identified the unlawful aspects of the employer policy when refusing to sign or abide by it. Rather, the Board has expressly rejected the argument that an employer could discharge employees who failed to sign an unlawful arbitration policy just because “neither specifically objected to signing ... on the grounds that it interfered with their ability to file an unfair labor practice charge.” *Alorica*, 2019 WL 3386283, at *6.

Even if correct, Motor City’s assertion that some of the discharged employees were concerned primarily with the Employment Agreement’s lawful non-compete provision (Br. 27) is thus beside the point. Moreover, Motor City did not discharge those employees because they objected to the non-compete clause, and there is no indication in the record that it would not have discharged them if they had objected only to the unlawful provisions. *See E.A. Renfroe*, 2019 WL 6840794, at *5 (rejecting similar argument). Employees were required to accept the Employment Agreement and the Contract and Receipt as a whole, including the

unlawful provisions, and the employees' refusal to sign those documents was the uncontested basis for their discharge.

Motor City is also wrong that a finding of unlawful discharge requires evidence of protected activity. Contrary to Motor City's suggestion (Br. 24-26), discrimination against protected activity is not the only way to violate the Act. That argument ignores Section 8(a)(1), which prohibits actions that "interfere with, restrain, or coerce" employee rights, 29 U.S.C. § 158(a)(1); discrimination or retaliatory motive "is not a required element." *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998). Discharging employees for failing to sign unlawful policies thus violates that provision "[r]egardless of whether [the employees] engaged in protected activity." *Alorica*, 2019 WL 3386283, at *6. That holding aligns with both the statutory text and the longstanding proposition that "lack of unlawful motive is not a defense to a Section 8(a)(1) charge." *Nat'l Cash Register Co. v. NLRB*, 466 F.2d 945, 963 (6th Cir. 1972); *see also Medeco*, 142 F.3d at 747-48 (employer's "claim that the evidence fails to show discriminatory intent cannot save it from liability under § 8(a)(1)"). It is also logical—an employee need not already have engaged in protected activity for employer action that would chill such activity to be unlawful. For that reason, Section 8(a)(1) "reach[es] employer conduct even when employees have yet to engage in protected activity." *Medeco*, 142 F.3d at 745.

Similarly, Motor City’s novel argument that backpay cannot be awarded absent discrimination (Br. 24-25) is contrary to both the statutory regime and the Board’s wide discretion in crafting remedies. If the Board finds that an employer “has engaged in or is engaging in *any* such unfair labor practice,” it has the power to order the employer “to take such affirmative action including reinstatement of employees with ... back pay, as will effectuate the policies” of the Act. 29 U.S.C. § 160(c) (emphasis added). The subsequent statutory provision that Motor City quotes (Br. 24)—that “back pay may be required of the employer or labor organization ... responsible for the discrimination”—makes clear only that, in cases that do involve discrimination, the party responsible for the discrimination is the party that owes backpay; it was added to the Act to ensure the Board could award backpay against unions as well as employers. *Radio Officers’ Union v. NLRB*, 347 U.S. 17, 54 (1954). That proviso in no way limits a backpay remedy to such cases.

Moreover, the Board’s power to “fashion[] remedies to undo the effects of violations of the Act” is a “broad discretionary one.” *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). It is for the Board to determine what remedy will best effectuate the Act in any given circumstance. Backpay is the “standard remedy” for an unlawful discharge. *Blue Square II, Inc.*, 293 NLRB 29, 40 (1989). The Board’s determination that employees discharged for refusing to agree to

unlawful rules should receive backpay is well within that broad remedial discretion.

In sum, Motor City should no more be allowed to give effect to the arbitration, solicitation and association, confidentiality, and indemnity policies as to maintain them. Both actions undermine the statutory scheme and impinge on employee rights. Like Motor City's maintenance of the unlawful policies, its discharge of Tilmon, Walker, Bartolucci, and Salzer for refusing to agree to those policies violated the Act.

B. The Bartolucci and Salzer Allegations Were Timely

Finally, Motor City's argument that relief for Bartolucci and Salzer was time barred (Br. 29-30) is defeated by well-established law regarding amended charges. Section 10(b) of the Act provides that an unfair-labor-practice charge must be filed within six months of the alleged unfair labor practice. 29 U.S.C. § 160(b). Under settled law, an amended charge may contain allegations that arose more than six months earlier if they are "closely related" to allegations in an earlier timely-filed charge and occurred within six months of that initial charge. *Redd-I, Inc.*, 290 NLRB 1115, 1115 (1988); *accord Charter Commc'ns, Inc. v. NLRB*, 939 F.3d 798, 809-11 (6th Cir. 2019); *Don Lee Distrib., Inc. v. NLRB*, 145 F.3d 834, 844 (6th Cir. 1998). In such circumstances, the amended charge relates back to the initial charge for timeliness purposes. *Univ. Moving & Storage Co.*, 350 NLRB 6, 19

(2007). An allegation is “closely related” if it “(1) involves the same legal theory as the charge allegation, (2) arises from the same factual circumstances or sequence of events as the charge allegation, and (3) raises similar defenses.”

Peters v. NLRB, 153 F.3d 289, 296 (6th Cir. 1998) (internal quotation omitted); *Redd-I*, 290 NLRB at 1118. The Board has “broad authority” when applying that test, and the Court’s “review ... is limited and deferential.” *Charter Commc’ns*, 939 F.3d at 809 (internal quotation omitted).

Motor City does not challenge the Board’s finding that the three *Redd-I* factors were met in this case. Those findings were well supported—the allegations that Salzer’s and Bartolucci’s discharges were unlawful involve the same factual scenario as Walker’s and Tilmon’s discharges (employees discharged around the same time for refusing to sign the same documents), the same legal theory (the discharges were unlawful because the unsigned documents contained unlawful rules), and prompted the same defenses from Motor City. And Salzer’s and Bartolucci’s discharges in February and March 2016 occurred within six months of the initial unfair-labor-practice charge filed in July.⁶

⁶ The fact that Bartolucci and Salzer did not file their own unfair-labor-practice charges (Br. 30) is of no moment. Under Board regulations, “any person” can file an unfair-labor-practice charge. *See* 29 C.F.R. § 102.9 (“Any person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce.”) The victim of the unfair labor practice need not file the charge to receive relief.

Instead, Motor City simply contends, without citation to any authority, that the *Redd-I* standard should not apply to allegations in which a monetary remedy is at stake. (Br. 30.) Caselaw imposes no such limit on the relation-back principle, and Motor City offers no rationale for one. *See, e.g., Columbia Textile Servs., Inc.*, 293 NLRB 1034, 1035-37 (1989) (finding amendment seeking backpay timely under *Redd-I*), *enforced mem.*, 917 F.2d 62 (D.C. Cir. 1990); *Davis Elec. Constructors, Inc.*, 291 NLRB 115, 115 (1988) (same). Motor City also appears to challenge the *Redd-I* framework itself (Br. 30), but this Court already has adopted it. *See, e.g., Charter Commc'ns*, 939 F.3d at 809-11; *Don Lee Distrib.*, 145 F.3d at 844-45. Finally, Motor City is incorrect that *Redd-I* is limited to new allegations involving the same individuals. (Br. 30.) Indeed, *Redd-I* itself involved the addition of a new discriminatee to the complaint. 290 NLRB at 1115; *see also Columbia Textile*, 293 NLRB at 1035-37 (same).

Motor City maintained policies that were unlawful under well settled and long established law. By requiring employees to accept those unlawful policies as a condition of employment, and discharging those employees who refused, Motor City violated the Act. The Board's findings were reasonable and supported by statutory text, precedent, and the Board's wide discretion and expertise in crafting and enforcing federal labor policy.

CONCLUSION

The Board respectfully requests that the Court deny Motor City's petition for review and enforce the Board's Order in full.

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February 2021

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Petitioner/Cross-Respondent)	
v.)	
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)	Nos. 20-1730,
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and)	
)	
PATRICIA TILMON, TERRENCE WALKER, and)	
GIANLUCA BARTOLUCCI)	
Intervenors)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its brief contains 9,400 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

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Dated at Washington, DC
this 4th day of February 2021

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 4th day of February 2021