

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

**HARBOR FREIGHT TOOLS USA, INC.**

**and**

**Case 28–CA–232596**

**DANIEL RUIZ, SR., an Individual**

*Fernando Anzaldúa, Esq. and Rodolfo Martinez, Esq.,  
for the Acting General Counsel,  
Warren J. Higgins, Esq. and Richard S. Zuniga, Esq.,  
(Hill, Farrer & Burrill, LLP), for the Respondent.*

**DECISION**

**STATEMENT OF THE CASE**

**GERALD M. ETCHINGHAM**, Administrative Law Judge. On December 11, 2018, Daniel Ruiz, Sr. (Charging Party or Ruiz) filed his charge in this Case 28–CA–232596 in Flagstaff, Arizona.<sup>1</sup> The Counsel for the Acting General Counsel (Acting General Counsel) issued the original complaint against Respondent Harbor Freight Tools USA, Inc. (Respondent or Employer) on January 22, 2020 and amended it at hearing with no objection (complaint). (Tr. 11–12.)<sup>2</sup> The Respondent answered the complaint generally denying its critical allegations.

The complaint alleges the Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (the NLRA or Act) by promulgating and/or maintaining three unlawful and overly broad rules regarding employee conduct and threatening employees with reprisal in Respondent’s associate or employee handbook (the three challenged rules) from July 5, 2016 through at least January 20, 2020 (the 2016 handbook).<sup>3</sup> (Tr. 8–14; GC Exh. 2.)

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<sup>1</sup> The charge also contained allegations of the unlawful discharge of Ruiz. That portion of the charge settled and is no longer a part of this case.

<sup>2</sup> The transcript in this case is generally accurate but it should be corrected at p. 7, line 12 as “Denise” should be “Vanise”; and at p. 48, line 24 as “customers” should be “competitors’.” Abbreviations used in this decision are as follows: “Tr.” for transcript; “R Exh.” for Respondent’s exhibit; “GC Exh.” for Acting General Counsel’s exhibit; “GC Br.” for the Acting General Counsel’s brief; and “R Br.” for the Respondent’s brief. Although I have included numerous citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

<sup>3</sup> Respondent issued a revised employee handbook online, effective as of January 20, 2020, to its employees which materially revised the Solicitation and/or Distribution Rule but left the Proprietary and Confidential Information Rule still defining employees’ personnel files as “confidential.” (Tr. 10–14, 53–55; GC Exh. 2; R Exh. 1 at 12, 25–26.)

This case was tried in Flagstaff, Arizona on March 10, 2020. On the entire record, including my observation of the demeanor of the witness, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The parties stipulate and I find that at all material times, Respondent, a national corporation with an office and place of business in Flagstaff, Arizona, a corporate headquarters in Calabasas, California, warehouses in California and South Carolina, and a call center in Camarillo, California (Respondent's facilities), has been engaged in the retail sale of tools throughout the continental United States. I further find that during the calendar year ending December 11, 2018, Respondent, in conducting its business operations derived gross revenues in excess of \$500,000. Also, during the same period of time described above, Respondent, in conducting its business operations, purchased and received at Respondent's Flagstaff, Arizona, facility, goods valued in excess of \$5000 directly from points outside the State of Arizona. The parties further stipulate, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(c) at 1–2; and GC Exh. 1(g) at 1.)

### II. ADDITIONAL GENERAL BACKGROUND

Respondent's director of talent development and employee relations, Sallie Taylor<sup>4</sup> (Director Taylor or Taylor), broadly testified that the three challenged rules in this case are necessary and Respondent presents a legitimate business justification for each rule in question generally due to its safety, productivity, and privacy concerns as well as protection against harassment and false, misleading, or defamatory statements.

Respondent operates a tool rental company with two distribution warehouses in Moreno Valley, California and Dillon, South Carolina. (Tr. 23; GC Exh. 3.) One distribution center has approximately 2 million square feet of space to warehouse its tools while the second distribution center is approximately 1 million square feet in size. (Tr. 64–65.) Each distribution center is comprised of stacked and racked product, shelves, pallets, conveyor lines, and loading and unloading areas. (Tr. 65.) Each distribution center also has some office space within. *Id.*

In addition, Respondent has over a thousand retail tool rental stores in the continental United States selling primarily to a range of customers from a semi-professional welder or electrician or general contractor to a do-it-yourselfer or the general public. (Tr. 19, 23–24, 63.) There are 8–12 stores per district which are managed by a district manager and approximately a hundred stores per region which are managed by Respondent's regional managers. *Id.* Employees at these retail stores also perform work outside the store, including collecting carts in parking lots,

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<sup>4</sup> Taylor began work with Respondent in April 2011, and has held various positions of increasing responsibilities as regional human resources (HR) manager for Respondent's Midwest and South Regions until February 2014 or 2015 and senior regional HR manager for Respondent's Western and Southern California Regions from February 2014 or 2015 until August 2017 when Taylor added the title of director of HR store support programs. (Tr. 18–21.) In February 2019, Taylor became Respondent's director of talent development and employee relations where she manages the field learning and development team which provides training programs to Respondent's retail store associates/employees and she also manages the employee relations team which manages Respondent's corporate employee relations as well as supports field employee relations. (Tr. 20–21.)

conducting sales up to six times a year in parking lots, unloading trucks in the loading docks, and advertising and selling products on the sidewalks in front of the store. (Tr. 63–64, and 77.)

Respondent has approximately 20,000 employees in total with approximately 16,000 of these employees working in over one thousand Respondent retail tool stores across the country. (Tr. 24, 58, 63; GC Exh. 3.) Of the 16,000 employees, approximately 9000 are non-management or nonsupervisory employees. *Id.*

Respondent's corporate headquarters is in Calabasas, California, and it has one thousand employees working there in two 2-story buildings. (Tr. 23, 65–66.) Respondent has its directors, managers, vice presidents, coordinators, analysts, assistants, and specialists working there. (Tr. 66.)

Respondent also operates an asset recovery center and customer service call center in nearby Camarillo, California, with approximately 30 employees. (Tr. 23, 66, 78.)

As stated above, the Respondent's 2016 handbook was in place on July 5, 2016 and maintained through January 20, 2020. (Tr. 8–11, 25, 53–55; GC Exh. 2; R Exh. 1.) The 2016 handbook was distributed to all of Respondent's nonsupervisory employees and became effective on July 5, 2016 at Respondent's two corporate offices buildings, all retail stores, its two distribution centers and its call center and Respondent expects all employees to fully comply with all rules in its handbook. (Tr. 25, 57–58.) Respondent's revised handbook as of January 20, 2020 is currently in place and is not challenged in this case (the 2020 Handbook). (Tr. 8–11, 25, 53–55; GC Exh. 2; R Exh. 1.)

### **III. RESPONDENT'S 2016 HANDBOOK**

Taylor admits that an employee can be disciplined and/or terminated for failing to comply with any rule in Respondent's handbook. (Tr. 58–59.)

Taylor knows that the 2016 handbook was created by Respondent's senior manager of HR in Respondent's corporate office, Felicia Ruiz (Ruiz), along with Respondent's Associate General Counsel Tammy Stafford (Stafford), and Respondent's General Counsel Mark Friedman (Friedman). (Tr. 25–26.)

Between July of 2016 and February of 2019, Taylor was responsible for answering questions, advising associates, anybody in the stores with regard to items that pertained to the 2016 handbook within her region or regions. (Tr. 22, 25, 53–55; GC Exh. 2.) In addition, Taylor was responsible for the rollout of the 2016 handbook and just ensuring that the existence of the new 2016 handbook was communicated to employees who may have had questions. *Id.*

Taylor also maintains a role in her current position with the employee disciplinary process as she provides advice on how Respondent has handled things in the past to ensure consistency, and she works to ensure that Respondent is being consistent with the application or enforcement of its discipline. (Tr. 22.)

Generally, Taylor consulted the 2016 handbook to review the specific language and to ensure consistency if there is a concern about something related to the 2016 handbook from an employee relations perspective. (Tr. 26.) In addition, Taylor opined that to determine whether an employee's conduct violated a rule or policy in the 2016 handbook, Taylor would typically look

at the code of conduct section of the 2016 handbook, consult with Respondent’s legal team, and look specifically at the specific language of the rule in question. (Tr. 26–27, 53–55; GC Exh. 2 at HFT 091–093.)

In addition, up through February 2019, Taylor was notified whenever a Respondent employee has violated any of Respondent’s rules or policies that were set forth in the 2016 handbook either by email or through Respondent’s case management system, or from following up on an anonymous tip line and 800 phone number that Respondent maintains for employee concerns. (Tr. 27.) Also, from 2014 through February 2019, as regional manager or senior regional manager, Taylor was responsible for everything concerning employee discipline that occurred in her regions and also, as a senior member of the field HR team, Taylor was often called on to consult on things that happened in other regions, or she was notified of things happening in other regions to provide feedback information about how Respondent has handled things in the past and how to understand how Respondent reads and views and enforces its policies and rules. (Tr. 28, 81.)

As of March 2020, however, Taylor is notified only about unusual disciplinary matters because she says that “items that are related to, like, attendance or cash violations would not get bubbled up to me [Taylor] unless it was to say that there is a clarity concern with regard to the policy or something of that nature.” (Tr. 27–28, 76.) Taylor explained further that “items that we do not run across frequently would be bubbled up to me to ensure consistency, so that I could investigate their—look at, you know, how it was investigated, look at all of the particular issues or particular information and ensure that we are being consistent and understanding things accurately.” Id.

#### IV. THE THREE CHALLENGED RULES

The Acting General Counsel alleges that since April 20, 2019, through January 20, 2020, the Respondent has maintained the following three challenged rules in its handbook.

##### *A. The First Challenged Rule*

###### **PROPRIETARY AND CONFIDENTIAL INFORMATION**

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

Confidential Information includes, but is not limited to, information from employee personnel files; financial information about [Respondent; Respondent’s] policies, procedures, and training materials; product testing information and analysis, and information from and about [Respondent’s] customers, including all personally identifiable information [...].

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

(Tr. 12; GC Exh. 1(c); GC Exh. 1(g); and GC Exh. 2 at 17–18.)

Taylor opined that she learned of this first challenged rule by her being present when questions about the policy came up through the course of discussion with Respondent's in-house General Counsel Friedman, Associate General Counsel Stafford, and Senior Manager of HR Ruiz. Taylor understands that Respondent's proprietary and confidentiality policy was created by Respondent to protect Respondent and its associate employees, and customers against the unauthorized disclosure of proprietary and confidential information. (TR. 25–26, 30–31, 74.) Taylor also has knowledge regarding the purpose of this rule and how it is implemented and understood from her earlier work as the director of employee relations, conversations that she has had with different members of the legal team, other management and employees including her immediate boss, and situations that she has had with others. (Tr. 74–75.)

Taylor further opined that Respondent's HR team maintains and stores an employee's official full personnel file electronically and, among other things, it contains the employee's home address, work progress, reviews, and wage and benefits information and other contact information. (Tr. 31–32, 35.)

Taylor also explained that in addition to an employee's full electronic personnel file, there is also one hard-copy personnel file for each employee at the store, distribution center, or wherever they actually work with original documents that include all disciplinary forms that they may have received and signed off on, and also includes their work progress reviews and information regarding anything that they disclose in their I-9, so their citizenship status and all of the associate's personal information, home addresses, and wage and benefits information, employment offer letters, other contact information, and anything else relevant. (Tr. 32, 35.)

Taylor further opined that it is also Respondent's policy that employees requesting a copy of their full personnel file must do so in writing and once the written request is received, Respondent provides copies of personnel files to employees in compliance with their state law. (Tr. 31–33, 78–79.)

Taylor also explained that all employees have access to a portion of their personnel documents such as those they receive from any disciplinary documentation and they have access to their work progress reviews and their wage and benefit pay information through Respondent's former electronic HRIS system.<sup>5</sup> (Tr. 33–34.) Employees acknowledge receipt of Respondent's employee handbook online using the HRIS system. (Tr. 57.)

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<sup>5</sup> In January 2020, Respondent switched to a new My HFT system which is an HR information system and in this current My HFT system, employees can take e-learnings (trainings), they can see their pay information and pay statements, they can enter their e-signature for any documents that need acknowledgment such as Respondent's handbooks and employees can access their performance reviews. (Tr. 56.)

Taylor was asked which employees have access to other employee's personnel files not their own and she explained that access to other employee personnel files is limited to HR management employees, assistant managers and store managers at their stores, and other field HR managers would have access to personnel files when they visit stores. (Tr. 34.)

Taylor further admitted that employee personnel files are included in the definition of Respondent's proprietary and confidential information rule because Respondent's property includes its employees' personnel files and employees "have a responsibility to protect the personal and private information of [Respondent's] associates [employees]." (Tr. 34–35, 59.)

Next, Taylor denied that the confidentiality rule was ever intended by Respondent to prevent an employee from disclosing or sharing information that they have obtained or might be included in their own personnel file and Taylor was unaware of any employee who had been disciplined under the proprietary and confidential information policy for disclosing or sharing information that they have obtained from another employee's personnel file or which might be included in their own personnel files. (Tr. 35.)

Taylor also admits that this rule defines confidential information to include information from employee personnel files. (Tr. 59.) Despite the apparent contrary language in the confidentiality rule, however, Taylor further opines that once they have requested their personnel file in writing and received it from Respondent, employees are allowed by Respondent to share documents from their personnel files to outside organizations and other employees without discipline or termination.<sup>6</sup> (Tr. 61, 79.)

Moreover, Taylor also denies that Respondent's confidentiality rule prohibits its employees from disclosing information about any events and circumstances involving the Respondent or its employees even though the rule specifically states that: "This [confidentiality] policy shall include events and circumstances that include [Respondent] Harbor Freight Tools, its customers, or its employees." (Tr. 62; GC Exh. 1(c); GC Exh. 1(g); and GC Exh. 2 at 17–18.)

Taylor further denies that the confidentiality rule would prohibit an employee from publicizing a union-organizing drive or a union election at one of Respondent's retail stores or distribution centers. (Tr. 62.) Taylor also explains that despite the specific wording of the confidentiality rule, an employee is not prohibited from sharing to anyone, outside of Respondent or with a fellow employee, anything that occurs to them as an employee at Respondent's retail stores or distribution centers including sharing with another employee or outside group any information concerning an event and circumstance from workplace accidents. *Id.*

Taylor also admitted that Respondent did not inform its employees about these specific alleged exceptions to the prohibitions of the confidentiality rule for disclosing information about

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<sup>6</sup> Retail employees usually do not have access to other employees' personnel files—only their own. (Tr. 61.)

events or circumstances related to working conditions of employment or from disclosing information about union organizing to third parties outside of Respondent. (Tr. 63.)

Taylor was also unaware of any employee who has had a question about whether they are permitted to disclose or share information from their own personnel files based on this policy and Taylor further denied that anyone at Respondent ever suggested to her that the purpose of this policy is that it is intended to prevent employees from disclosing or sharing information from their own personnel files. (Tr. 63.)

Taylor also opined that this policy was not intended to prevent employees from disclosing or sharing information about their own wages, hours, or working conditions, she has not learned from any source that an employee has had a question about whether this policy prevents them from disclosing or sharing information about their wages, hours, or working conditions, and Taylor further denied knowing of any Respondent employee who has been disciplined under this policy for disclosing information about their wages, hours, or working conditions. (Tr. 35–36.)

Finally, Taylor denied that the proprietary and confidentiality policy was adopted in response to any union or union-related activity, she also denied knowing whether any employee ever asked Respondent officials whether the policy applies to unions or union-related activity, and Taylor also denied that any Respondent employee has ever been disciplined under this policy for engaging in any kind of union-related activity.<sup>7</sup> (Tr. 36–37.)

### **B. The Second Challenged Rule**

#### **SOCIAL MEDIA AND NETWORKING GUIDELINES**

##### **3. Testimonials and Endorsements**

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

(GC Exh. 1(c); GC Exh. 1(g); and GC Exh. 2 at 31–37.)

Taylor learned of Respondent's business reasons for its social media and networking guidelines policy also from speaking to Associate General Counsel Stafford from Respondent's legal department who Taylor understands drafted this policy with Ruiz and Friedman. (Tr. 47,

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<sup>7</sup> These denials by Taylor are the same for each of the three challenged rules as discussed below. See Tr. 45-46, 50–53.

74.) Taylor explains that this second challenged rule is intended by Respondent to protect Respondent's customers, competitors, Respondent, and its employees, officers,<sup>8</sup> suppliers, or partners "against false, misleading, or defamatory statements, as well as harassment." (Tr. 47–48, 74.) Taylor also has knowledge regarding the purpose of this rule and how it is implemented and understood by employees from her earlier work as the director of employee relations, conversations that she has had with different members of the legal team, other management and employees including her immediate boss, and situations that she has had with others. (Tr. 74–75.)

Taylor further opined that the rule is intended to ensure that if an employee posts something on social media, that they are posting their own opinion, and that it is clear they are posting their own opinion and not the opinion on behalf of the Respondent or as Respondent's agent. (Tr. 48.)

Taylor also explained that "testimonials and endorsements" are within the social media and networking policy as she understands it as these mean testimonials and endorsements about Respondent's products, any comparison to Respondent's products and Respondent's competitors' products. Taylor further explained that Respondent has concerns about "testimonials and endorsements" on social media because this is regulated by the Federal Trade Commission (FTC) and there are legalities related to testimonials and endorsements, and it is important for Respondent to clarify what those requirements or guidelines are for Respondent's employees. (Tr. 48–49.)

Taylor was further directed to opine about another part of Respondent's social media and networking guidelines policy—the rule at page 36 of the handbook advising employees: "Do not make any claims about [Respondent] Harbor Freight Tools or its services or Harbor Freight Tools' competitors or their services that are not substantiated, i.e., for which you do not have adequate proof to back up the claim." (Tr. 49; GC 2 at 36.)

Taylor opined that her understanding of this part of Respondent's second challenged rule is that it is intended to address:

instances in which comments or testimonials and endorsements may be made about our products, our competitor's products that may make claims about our products that are inaccurate in an attempt to make our product, you know, sound better in comparison to the competitor's product, protect against, you know, any false or misleading statements about our competitor's product in an attempt to make our product look better in comparison.

(Tr. 49.)

Taylor further explained that her understanding is that the FTC further requires that all testimonials or endorsements must be true. (Tr. 49–50, 77.) Taylor admits, however, that she has

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<sup>8</sup> Taylor understands that "officers" included in this rule means Respondent's chief financial officer and other executives at Respondent such as its president and executive vice president and owner as Respondent did not have a chief executive officer at the time of hearing. (Tr. 75.)

no experience resolving any issues with FTC regulations or this social media rule as Respondent has never had a situation arise relating to a testimonial or an endorsement. (Tr. 77.)

Next, Taylor opines that the same explanation exists for why Respondent also has the additional rule: “Do not make any factually inaccurate statements, particularly statements that may be disparaging or defamatory regarding Harbor Freight Tools, Harbor Freight Tools’ competitors, or Harbor Freight Tools’ employees, officers, suppliers, or partners.” (Tr. 50.) Taylor explains that this additional rule is intended to address the same concern that all testimonials and endorsements must be true. (Tr. 50.)

Taylor also denied having any knowledge that any employee has had a question about whether the social media and networking guidelines policy would prevent them from disclosing or sharing information about their wages, hours, or working conditions or that Respondent’s solicitation and/or distribution policy was intended to prevent employees from disclosing or sharing information about their wages, hours, or working conditions. (Tr. 50–51.) Moreover, Taylor further denied having any knowledge of any Respondent employee being disciplined under this policy for disclosing information about their wages, hours, or working conditions. *Id.*

No evidence was presented that showed that Respondent’s social media and networking guidelines policy was adopted in response to any union or union-related activity, she also denied knowing whether any employee ever asked Respondent officials whether the policy applies to unions or union-related activity or that any Respondent employee has ever been disciplined under this policy for engaging in any kind of union-related activity. (Tr. 50–51.) Moreover, Taylor also denied that the social media policy was intended to prevent employees from criticizing Respondent. (Tr. 51–52.)

Taylor next opined about language on page 32, item 13, of the Employee Handbook which is under a “Standards of Conduct and Corrective Action” heading on the prior page and warns against: “Making or publishing false or malicious statements concerning any employee, supervisor, manager, [Respondent] Harbor Freight Tools, its products, work or reputation.” Taylor explained that this rule means that an employee “should not make statements concerning an employee, a supervisor, a manager, the [Respondent] Company, our products, work or our reputation that is false or malicious.” (Tr. 52.) Taylor further opined that the Respondent’s business purpose for this rule is to “protect against defamation, harassment, [and] false statements.” *Id.*

Taylor also explained that there is further limiting language for this rule that provides that: “This policy will not be applied in a way that interferes with employees’ rights to communicate with each other about work-related issues.” (Tr. 52–53.) Taylor further explained that this limitation means “that associates [employees] are allowed to communicate with each other about items related to their employment, including their pay, their work condition, items of that nature.” (Tr. 53.)

### **C. The Third Challenged Rule**

#### **SOLICITATION AND/OR DISTRIBUTION**

[...]

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

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

(GC Exh. 1(c); GC Exh. 1(g); and GC Exh. 2 at 18, 24, 31–37.) (*Emphasis in original.*)

Taylor opined that she also acquired an understanding of Respondent's rationale for the solicitation and/or distribution rule from speaking to Associate General Counsel Stafford who Taylor understands drafted this policy. (Tr. 37–38, 74.) Taylor has spoken to Stafford about Respondent's business reason for this policy which is “to protect against disturbances, interruptions, distractions that may affect productivity and safety [at Respondent].” (Tr. 38–39, 74.) Taylor also has knowledge regarding the purpose of this rule and how it is implemented and understood by employees from her earlier work as the director of employee relations, conversations that she has had with different members of the legal team, other management and employees including her immediate boss, and situations that she has had with others. (Tr. 74–75.)

Taylor further opines that the impact to Respondent if employees are distracted while working is that they or Respondent's customers can suffer from accidents and/or injuries as Respondent has many stores and distribution centers which have stockrooms that have forklifts and have a lot of work activity with regard to different machinery and forklifts and things like that happening, things of that nature. (Tr. 40.)

Taylor further explained that specifically as to Respondent's two distribution centers, there are safety concerns because Respondent has 2 million square feet of product that can be stacked high, and Respondent also has different machines being used to gather that product and load trucks. (Tr. 40–41.) Taylor further opines that Respondent sends out hundreds of full trucks a week with product in it, and “there's a lot of different, kind of very organized activity happening in any one moment in terms of people pulling product, people filling the trucks, and somebody that is being

distracted and is not focused on the machine that they are operating or the machine that somebody else is operating, you know, there is always a safety concern there.” (Tr. 41.)

Taylor further explained that specifically as to Respondent’s thousands of retail stores, there are also safety concerns that Respondent’s solicitation and/or distribution policy is intended to address because Respondent has stockrooms in its stores and Respondent has a lot of product in its stores that is stacked up, and Respondent’s associate employees are responsible at any given time for pulling product and filling the sales floor and there’s a forklift that might be loading a customer’s car with a product or moving heavier items in the stockroom. Anything over 50 pounds would require a team, so Respondent may have two people that are potentially moving a product together at one time. (Tr. 41–42.)

Taylor further explained that various solicitation activities referenced in Respondent’s policy that implicate safety are directly connected to somebody talking to an employee at work about something unrelated to the job when an employee could get distracted and are unable to focus on doing the job and doing the job safely. (Tr. 42.) Taylor also opined that Respondent’s solicitation and/or distribution policy is intended to protect an employee’s productivity at work because if somebody is speaking to an employee about something unrelated to the job, then the employee is distracted from the work that he or she is doing, potentially unable to support a customer, the employee is delayed in completing whatever task that they are doing, and all this impacts Respondent’s productivity and its labor standard. (Tr. 42.)

Taylor estimates that Respondent conducts approximately six parking lot sales per year at its retail stores in actual parking lots or outside sidewalks of the store. (Tr. 64.) Of these six parking lot sales, many stores conduct the sale fully inside the retail store and not outside in a parking lot. Id. Taylor opines that a parking lot can be a work area if an employee is working on the clock and they are collecting shopping carts.<sup>9</sup> (Tr. 80.)

Taylor understands that Respondent’s solicitation policy prohibits all solicitation activities in Respondent’s work areas for any purposes. (Tr. 66–67.) Taylor further admits that Respondent’s solicitation rule prohibits all solicitation for outside organizations in all of Respondent’s work areas during working time and this includes prohibiting solicitation in support of a union if done in any work area during working time. (Tr. 67.)

Taylor pointed out that the solicitation and/or distribution rule does not apply on nonworking time and in the break room at Respondent’s retail stores, the parking lot, or the restrooms.<sup>10</sup> (Tr. 42–44.) Taylor further opined that “work areas” in Respondent’s stores would

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<sup>9</sup> Taylor further explains that if there is no work being performed in a parking lot and there is no outside parking lot sale, the parking lot would not be considered a work area if the outside employee was also not doing work while on the clock. (Tr. 80.)

<sup>10</sup> Taylor explains that Respondent’s restrooms in its retail stores are open to the public and employees and Taylor opines that the mere presence of a customer or client in a restroom would transform that restroom into a working area and if two employees are discussing business information in the restroom when a customer or client

be located where actual work occurs such as at its “sales floor, the stockroom, the stock area, the warehouse area, the loading dock, the manager’s office, and the cash office” while, generally, the “nonwork areas” are at Respondent’s cafeterias, lobbies, parking lots, break rooms, and restrooms.<sup>11</sup> (Tr. 43, 70–71.)

Taylor explains that the solicitation and/or distribution rule applies at Respondent’s headquarters in work areas which she describes as areas where actual work is performed such as in individual offices largely inhabited by Respondent’s corporate management and salaried employees. (Tr. 71–72.)

Taylor again clarified that there is an exclusion from “nonwork areas” in the rule for “any areas where customers or clients may congregate or employees perform work for [Respondent] Harbor Freight Tools” and she further opined that is most likely to be areas primarily on the sales floors, but that stockrooms, manager offices, cash offices, and loading docks, while not the usual place to find customers or clients, these are also places where infrequently customers or clients may congregate and employees perform work. (Tr. 44–45.)

Taylor also denied having any knowledge that any employee has had a question about whether the solicitation and/or distribution policy would prevent them from disclosing or sharing information about their wages, hours, or working conditions or that Respondent’s solicitation and/or distribution policy was intended to prevent employees from disclosing or sharing information about their wages, hours, or working conditions. (Tr. 45.) Moreover, Taylor further denied having any knowledge of any Respondent employee being disciplined under this policy for disclosing information about their wages, hours, or working conditions. (Tr. 45–46.)

Finally, Taylor was unaware whether Respondent’s solicitation and/or distribution policy was adopted in response to any union or union-related activity, she also denied knowing whether any employee ever asked Respondent officials whether the policy applies to unions or union-related activity, and Taylor also denied that any Respondent employee has ever been disciplined under this policy for engaging in any kind of union-related activity. (Tr. 45–46.)

## ANALYSIS

### I. CREDIBILITY

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or

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enters, Respondent would expect them to stop speaking about business information while the customer or client are in the restroom. (Tr. 77, 79–80.)

<sup>11</sup> Taylor explained that not all of Respondent’s facilities have these nonwork areas and that it depends on the actual location. Respondent’s retail stores typically do not have a cafeteria or a lobby. Its corporate office typically has all of the above, as do its two distribution centers. (Tr. 43–44.) Taylor has no experience working directly at Respondent’s distribution centers or at its Camarillo call center, so Taylor had no opinion how Respondent’s solicitation and/or distribution rule is applied at those locations. (Tr. 71–72.)

admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness’ testimony. *Daikichi Sushi*, 335 NLRB at 622.

I find that the lone witness who testified in this case for Respondent, Director Taylor, was believable at times and that she testified in a comfortable manner bringing many past experiences from her prior work at several regional positions with Respondent to the hearing. Taylor was not being truthful, though, when she disregarded the plain language of Respondent’s confidentiality rule and she opined that once an employee has requested their personnel file in writing and received it from Respondent, employees are allowed by Respondent to share all documents from their personnel files including their wage and benefits information with other employees and outside organizations without discipline or termination despite the confidentiality rule’s specific prohibition that employees not disclose information from an employee’s personnel file to third parties including other employees or outside organizations. (Tr. 61, 79.)

Moreover, Taylor was not believable when she denied that Respondent’s confidentiality rule prohibits its employees from disclosing information about any events and circumstances involving the Respondent even though the rule specifically states that: “This [confidentiality] policy shall include events and circumstances that include [Respondent] Harbor Freight Tools, its customers, or *its employees*.” (Tr. 62; GC Exh. 1(c); GC Exh. 1(g); and GC Exh. 2 at 17–18.) (Emphasis added.)

Taylor also appeared ill at ease when she tried to explain that under the confidentiality rule, an employee is not prohibited from sharing with anyone, outside of Respondent or with a fellow employee, anything that occurs to them as an employee at Respondent’s retail stores or distribution centers including any workplace accidents despite the plain language in the rule prohibiting employees from disclosing information about all events and circumstances that involve all of Respondent’s employees. (Tr. 62; GC Exh. 2 at 17–18.) Finally, I find that Taylor was also not being truthful when she opined that Respondent’s confidentiality rule was not intended to prevent employees from disclosing or sharing information about their own wages, hours, or working conditions. (Tr. 35–36.)

With respect to the other two challenged rules here, Taylor was upfront and believable as she testified that she learned of the business rationale for the rules from Respondent’s legal department team and her understanding as to Respondent’s legitimate justifications for creating these rules combined with her experience in HR as one of the Respondent’s most senior managers who advises others on discipline for an alleged rule violation and she is also very experienced having received information on most discipline of employees at Respondent, I find Taylor’s limited understanding of Respondent’s legitimate business justifications persuasive to the extent she had knowledge.<sup>12</sup>

## II. THE CURRENT *BOEING* RULES TEST

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<sup>12</sup> The Acting General Counsel’s first reference to Federal Rule of Evidence Rule 801 in his closing brief to object to Taylor’s testimony here is untimely and does not repair the lack of objection to Taylor’s testimony at the hearing. See GC Br. at 3, fn 4, and *Alvin J. Bart & Co.*, 236 NLRB 242, 243 (1978), enforcement denied on other

Under *Boeing* [*Co.*, 365 NLRB No. 154 (2017)], ... the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful and placed in Category 1(a). If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by balancing “the nature and extent of the potential impact on NLRA rights” against “legitimate justifications associated with the rule,” viewing the rule or policy from the employees’ perspective. *Id.*, slip op. at 3. As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to ... interfere with the exercise of Sec. 7 rights outweighs the legitimate interests they serve. Categories 1(a), 1(b), and 3 designate *types* of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*’s balancing framework. These rules are placed in Category 2.

*Windsor Sacramento Estates, LLC d/b/a Windsor Care Center of Sacramento*, 369 NLRB No. 146, slip op. at 3, fn.3 (2020).

### III. THE THREE CHALLENGED RULES

#### **A. Respondent’s Proprietary and Confidential Information Rule Is Unlawful under Section 8(a)(1). (Complaint Pars. 4(a), and 5(a) and 5.)**

Paragraph 4(a) of the Acting General Counsel’s complaint alleges that from April 20, 2019, through January 20, 2020, Respondent has maintained the following unlawful rule in the 2016 Handbook:

#### **(a) PROPRIETARY AND CONFIDENTIAL INFO.**

Employees may have access to Proprietary and Confidential information during the course of employment with Harbor Freight Tools. Each Employee shall ensure that Proprietary and Confidential Information is used only for valid company purposes. Employees are prohibited from disclosing Proprietary, Confidential, or other

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grounds, 598 F.2d 1267 (2d Cir. 1979) (Board found questionable hearsay testimony admissible because the respondent did not object to the testimony at the hearing.).

information about the operations of Harbor Freight Tools to third parties except as directed in writing by an authorized representative or officer of Harbor Freight Tools. [...]

Confidential Information includes, but is not limited to, information from employee personnel files; financial information about [Respondent; Respondent's] policies, procedures, and training materials; product testing information and analysis, and information from and about [Respondent's] customers, including all personally identifiable information [...].

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

The Acting General Counsel argues that this confidentiality rule is unlawful because it prohibits employees from disclosing personal employee information, including information from employee personnel files and absent additional context, employees would reasonably read personnel files to include contact information and other information concerning wages, benefits, disciplinary actions, and other terms and conditions of employment they are lawfully permitted to discuss with the Union or each other. The Acting General Counsel further argues that the Respondent did not present any credible evidence that its employees can share or have shared personnel file information and, Taylor even admitted that employees would be expected to stop talking about all business information contained in their personnel files while a customer is in the restroom with them. Tr. 14, 79; GC Br. at 4, and 10–12.

The Acting General Counsel also argues that: “[a]bsent any additional context, employees would reasonably read “personnel files” to include contact and other information concerning wages, benefits, disciplinary actions, and other terms and conditions they are permitted to discuss with a union or each other, and Respondent has failed to identify a legitimate business reason for the rule or impinging on this aspect of employee Section 7 rights . . . [and paragraph 6 of the confidentiality rule involving events or circumstances involving the Employer’s employees] thus prohibits disclosure of information about events or circumstances involving the Employer’s employees . . . [and c]onsequently, paragraph 6 encompasses, and in turn prohibits, the disclosure of information about events or circumstances involving the Employer’s employees.” (GC Br. at 10–11.) The Acting General Counsel adds that “insofar as paragraph [5 of the confidentiality rule], which defines ‘Confidential Information’ to include ‘information from employee personnel files’, such information would include employees’ wage rates and/or salaries, disciplines, and other items that employees are permitted to discuss concertedly under Section 7. (GC Br. at 11.)

The Acting General Counsel concludes arguing that: “[w]hile protecting proprietary information is a legitimate business justification, the [confidentiality] rule is overly broad because, as admitted by Respondent, it sweeps in confidential information which it defines to include terms and conditions of employment, including events or circumstances relating to their working conditions, that employees have a right to discuss with third parties . . . [and n]otably, Respondent never communicated to its employees that its confidentiality rule does not prohibit them from disclosing events or circumstances relating to their working conditions or employment or that it

does not prohibit them from disclosing information about events or circumstances relating to union organizing.” (GC Br. at 11.)

Taylor admitted that employee personnel files are included in the definition of Respondent’s proprietary and confidential information rule because Respondent’s property includes its employees’ personnel files and employees “have a responsibility to protect the personal and private information of [Respondent’s] associates [employees].” (Tr. 34–35, 59.) As stated above, and contrary to the specific prohibiting language in the confidentiality rule, Taylor unconvincingly denies that employees are prohibited under the rule from sharing with other employees or outside entities information contained in their personnel files or information about some events and circumstances that occurred while they were employed at Respondent, including information about wages and other pay information. (Tr. 35–36, 59, 61–62, 79; GC Exh. 2 at 17–18.)

I find that the Acting General Counsel has put forth sufficient evidence to meet its initial burden to prove that Respondent’s confidentiality rule, when objectively and reasonably interpreted by Respondent’s employees, prohibits and interferes with the exercise of employees’ Section 7 rights to openly share the terms and conditions of their employment with other employees and outside third parties including information contained in their personnel files such as disciplinary actions, wages and benefits, work progress reviews, employment offer letters and employee addresses and other contact information. In addition, I further find that any adverse impact on employees’ Section 7 rights is not outweighed by any credible business justifications from Respondent. In fact, Respondent has not shown or persuasively explained any legitimate business justification for preserving confidentiality in its employees’ personnel files, their contents, or in events or circumstances involving its employees that is necessary to outweigh the rule’s interference with Respondent’s employees’ Section 7 rights. Instead, Taylor says employees are free to share the contents of their personnel files with other employees and third parties despite the rule’s plain language contradiction. As a result, I place this rule in Category 3 and further find that the Confidentiality Rule is unlawful and any so-called business justification to preserve confidentiality here does not outweigh the Respondent’s employees’ Section 7 rights to share their personnel files and openly discuss the terms and conditions of employment, including personnel files, their contents, and events and circumstances of their employees.

Here, the Respondent’s confidentiality rule is unlawful because it does not present accompanying language that would tend to restrict its application but, instead, contains the broad and sweeping reference to the prohibition of sharing information contained in an employee’s personnel file. It therefore allows employees to reasonably assume that the confidentiality rule pertains to—among other things—certain protected employee terms and conditions of employment contained in personnel files such as disciplinary actions, wages and benefits, work progress reviews, employment offer letters and employee addresses and other contact information. See *Allstate Insurance Co.*, 332 NLRB 759, 765 (2000) (Employees engaged in concerted activities protected by the Act when they discussed their working conditions with a magazine reporter.) By including nondisclosure of employee information in confidential personnel files, in its confidential policy, the Respondent leaves to the employees the task of determining what is permissible and speculate what kind of information disclosure may trigger a rule violation and discipline. See *Flex Frac Logistics*, 358 NLRB 1131, 1140 (2012), *affd.* in relevant part, 746 F.3d 205 (5th Cir. 2014) (Board restated established precedent that “. . . nondisclosure rules with very similar language are unlawfully overbroad because employees would reasonably believe that they

are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives—an activity protected by Section 7 of the Act.”) See also *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004)(Rule prohibiting employees from discussing grievance/complaint information, disciplinary information, and other work-related matters unlawful).

I also find that this rule, reasonably construed, would restrict employees’ protected activities. The rule at issue is not limited to Respondent’s own nonpublic, proprietary, or confidential records but also includes a specific prohibition on an employee’s right to disclose or share information contained in an employee’s personnel file including events and circumstances at work and wage and benefits information, disciplinary actions, performance reports, personal contact information, and other terms and conditions of their employment. See e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978) (Employees have a Sec. 7 right to discuss among themselves, and with the public, information about their terms and conditions of employment for the purpose of mutual aid and protection.) In contrast, the Confidentiality Rule here is distinguishable from rules in other recent cases which do not prohibit employees sharing information from their personnel files with other employees or third parties. See e.g., *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 2-3 (2021)(Board finds confidentiality rule lawful where disclosure of employer’s copyrighted, trademarked, trade secrets, or other sensitive information prohibited); *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 3–4 (2019) (Board holds Employer’s confidentiality rule lawful as it narrowly applies to Employer’s “own nonpublic, proprietary records” including its customer and vendor lists); see also, *Motor City Power Brokers, Inc.*, 369 NLRB No. 132, slip op. at 5 (2020) (Board finds confidentiality rule lawful and placed in *Boeing* Category 1(a) because employees would reasonably understand from the numerous examples of confidential information specified in the Employer’s handbook that they are limited to prohibiting disclosure of legitimately confidential and proprietary information rather than information contained in employees’ personnel files or pertaining to other terms and conditions of employment.)

Further, employees must not be required to obtain prior authorization from the employer in order to engage in protected activity. See *Schwan’s Home Service*, 364 NLRB No. 20, slip op. at 4 (2016), citing *Brunswick Corp.*, 282 NLRB 794, 795 (1987). Also, see *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 4–5 (2016).

As such, I find the Respondent’s maintenance of its Proprietary and Confidential Information rule stated in paragraphs 4(a), 5, and 6 of the complaint is unlawful under Section 8(a)(1) of the Act.

**B. Respondent’s Social Media and Networking Guidelines Rule Is Lawful. (Complaint Pars. 4(c) and 5.)**

Paragraph 4(c) of the Acting General Counsel’s complaint alleges that since about April 19, 2019 through January 20, 2020, Respondent has maintained the following policies in its employee handbook:

**(c) SOCIAL MEDIA AND NETWORKING GUIDELINES**

**3. Testimonials and Endorsements**

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

The Acting General Counsel argues that this rule is unlawful in two respects because: “First, the portion of the rule prohibiting employees from posting any claims about the Employer that are not substantiated, i.e., for which you do not have adequate proof to back up the claim, is overbroad and unlawful . . . [; and s]econd, in the next bullet point of the rule, Respondent prohibits employees from making any factually inaccurate statements about Respondent or its officers, which is again overbroad and unlawful.” (Tr. 15, GC Br. at 13-16.)

Taylor generally testified that this rule is necessary because Respondent and the FTC have substantial business reasons for requiring that all testimonials or endorsements be true as Respondent, its business, competitors, etc. could suffer damages if an employee made false statements concerning Respondent, its competitors, its employees, its officers, suppliers, or partners. (Tr. 49–50, 77.) In addition, Taylor further opined that the Respondent’s business purpose for this second challenged rule is to “protect against defamation, harassment, false statements.” (Tr. 52.) Taylor explains that this second challenged rule is intended by Respondent to protect Respondent’s customers, competitors, Respondent, and its employees, officers,<sup>13</sup> suppliers, or partners “against false, misleading, or defamatory statements, as well as harassment.” (Tr. 47–48, 74.) Taylor also has knowledge regarding the purpose of this rule and how it is implemented and understood by employees from her earlier work as the director of employee relations, conversations that she has had with different members of the legal team, other management and employees including her immediate boss, and situations that she has had with others. (Tr. 74–75.) Taylor further opined that the rule is intended to ensure that if an employee posts something on social media, that they are posting their own opinion, and that it is clear they are posting their own opinion and not the opinion on behalf of the Respondent or as Respondent’s agent. (Tr. 48.) Taylor opined that her understanding of this part of Respondent’s second challenged policy is that it is intended to address:

instances in which comments or testimonials and endorsements may be made about our products, our competitor’s products that may make claims about our products that are inaccurate in an attempt to make our product, you know, sound better in comparison to the competitor’s product, protect against, you know, any false or misleading statements about our

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<sup>13</sup> Taylor understands that “officers” included in this rule means Respondent’s chief financial officer and other executives at Respondent such as its president and executive vice president and owner as Respondent did not have a chief executive officer at the time of hearing. (Tr. 75.)

competitor's product in an attempt to make our product look better in comparison.

(Tr. 49.)

The Acting General Counsel also argues that this rule is overlybroad as it prohibits all employee disparagement of Respondent, its business practices, and terms and conditions of employment. (GC Br. at 13-16.) Also, the Acting General Counsel further argues that Section 7 of the Act protects an employee's right to publicly disparage his employer to gain support for an ongoing labor dispute or induce group action as long as the communication is not malicious. Id.

I find that this second challenged rule involving Social Media and Networking Guidelines which prohibit unsubstantiated claims against Respondent and factually inaccurate statements or disparagement against Respondent's competitors or their services, or Respondent's employees, officers, suppliers, or partners falls squarely into the category of lawful, commonsense, facially neutral rules that require employees to foster "harmonious interactions and relationships" in the workplace and adhere to basic standards of civility. See *Boeing*, 365 NLRB No. 164, slip op. at 4 fn. 15; see also *Motor City Pawn Brokers Inc.* 369 NLRB No. 132 slip op. at 5-7 (2020) (same).

In addition, even if a balancing test is called for here as to the nondisparagement portion of the Social Media and Networking Guidelines rule, I further find the rule lawful after balancing the adverse impact on Section 7 activity with Respondent's legitimate business justifications associated with this nondisparagement rule refenced above. Moreover, the nondisparagement rule here does not unlawfully prohibit statements to other employees which are intended to injure the reputation of the Respondent or its management personnel so it does not significantly restrict Section 7 rights. See *Union Tank Car Company*, 369 NLRB No. 120, slip op. at 2-3 (2020)(Board finds employer's nondisparagement rule unlawful which prohibited statements to other employees that are intended to injure the reputation of the employer or its management personnel as significantly restricting Section 7 rights.) As such, I find the Respondent's maintenance of its Social Media and Networking Guidelines rule stated in paragraphs 4(c), 5, and 6 of the complaint is lawful under Section 8(a)(1) of the Act.

#### **IV. RESPONDENT'S SOLICITATION AND/OR DISTRIBUTION RULE IS UNLAWFUL. (COMPLAINT PARS. 4(B) AND 5.)**

Paragraph 4(b) of the Acting General Counsel's complaint alleges that since about April 19, 2019, through January 20, 2020, Respondent has maintained the following policies in its employee handbook:

##### **(b) SOLICITATION AND/OR DISTRIBUTION**

[...] With respect to employee activity, Harbor Freight Tools prohibits all solicitation activities in Harbor Freight Tools' work areas for any purpose, including without limitation, for the purpose of financial gain, subscriptions, lotteries, or charities, religious or political causes, memberships, outside organizations, or other personal matters unrelated to employment with Harbor Freight Tools. Employees may solicit co-workers about causes, interests, political issues, and membership during

breaks or lunches and other non-working time in non-work areas, so long as employees do not disrupt or interfere with ongoing Harbor Freight Tools operations or harass other employees. [...]

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

The Acting General Counsel argues that this rule is unlawful because it also prohibits employees from all solicitation activities in all of its work areas for any purpose, including solicitation for outside organizations and unions, during nonworking time and accordingly, under Respondent’s rule, employees can only solicit in nonworking areas during nonworking time, and that is unlawful under Board law. (Tr. 14–15, 66–67; GC Br. at 5, and 12–13.)

Taylor opined that the rules were justified given Respondent’s legitimate business reasons to protect customers’ and employees’ safety and to protect Respondent’s productivity of its employees. The third challenged rule is nondiscriminatory and prohibits all solicitation and distribution in Respondent’s working areas during working times despite the nature of the solicitation and distribution. Taylor has spoken to Stafford about Respondent’s business reason for this policy which is “to protect against disturbances, interruptions, distractions that may affect productivity and safety [at Respondent].” (Tr. 38–39, 74.) Taylor also has knowledge regarding the purpose of this rule and how it is implemented and understood by employees from her earlier work as the director of employee relations, conversations that she has had with different members of the legal team, other management and employees including her immediate boss, and situations that she has had with others. (Tr. 74–75.) Taylor further opines that Respondent sends out hundreds of full trucks a week with product in it, and “there’s a lot of different, kind of very organized activity happening in any one moment in terms of people pulling product, people filling the trucks, and somebody that is being distracted and is not focused on the machine that they are operating or the machine that somebody else is operating, you know, there is always a safety concern there.” (Tr. 41.) Taylor further explained that specifically as to Respondent’s thousands of retail stores, there are also safety concerns that Respondent’s solicitation and/or distribution policy is intended to address because Respondent has stockrooms in its stores and Respondent has a lot of product in its stores that is stacked up, and Respondent’s associate employees are responsible at any given time for pulling product and filling the sales floor and there’s a forklift that might be loading a customer’s car with a product or moving heavier items in the stockroom. Anything over 50 pounds would require a team, so Respondent may have two people that are potentially moving a product together at one time. (Tr. 41–42.)

Taylor further explained that various solicitation activities referenced in Respondent's policy that implicate safety are directly connected to somebody talking to an employee at work about something unrelated to the job when an employee could get distracted and are unable to focus on doing the job and doing the job safely. (Tr. 42.) Taylor also opined that Respondent's solicitation and/or distribution policy is intended to protect an employee's productivity at work because if somebody is speaking to an employee about something unrelated to the job, then the employee is distracted from the work that he or she is doing, potentially unable to support a customer, the employee is delayed in completing whatever task that they are doing, and all this impacts Respondent's productivity and its labor standard. (Tr. 42.)

Taylor has no knowledge whether the solicitation rule applies to the warehouse area at the distribution centers or the call center as she doesn't work very closely with the distribution center or call center and did not feel comfortable answering questions about how the solicitation rule is applied at the distribution center and call center. (Tr. 71–72.)

Again, the Acting General Counsel argues that these rules are overbroad and that they fail to clarify that the non-solicitation/distribution restrictions do not apply to working areas during non-work time. (GC Br. at 10, 12–13.)

I find that this Solicitation and/or Distribution rule, reasonably construed, would restrict employees' protected activities and are overbroad as they fail to clarify that the non-solicitation/distribution restrictions do not apply to working areas during non-work time. It is well established that employees have a right to solicit during nonworking time and distribute literature during nonworking time in nonworking areas. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); see also *Republic Aviation Corp.*, 324 U.S. 793 (1945) (Restrictions on solicitation, without limitations or exceptions for nonwork time or nonwork areas have long been found contrary to the purposes of the Act.). Also, the Board has long recognized the principle that “[w]orking time is for work,” and thus has permitted employers to adopt and enforce rules prohibiting solicitation during “working time,” absent evidence that the rule was adopted for a discriminatory purpose. *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), *enfd.* 142 F.2d 1009 (5th Cir. 1944), *cert. denied* 323 U.S. 730 (1944). Also, the *Boeing* analysis referenced above in Section II., is inappropriate for the challenged Solicitation and/or Distribution rule here as: “The Board in *Boeing* did not disturb longstanding precedent governing employer restrictions on solicitation and distribution, which already strikes a balance between employee rights and employer interests.” See *UPMC Presbyterian Shadyside*, 366 NLRB No. 142, slip op. at 1, fn. 5 (2018) (Rule unlawful on its face because, with no explanation of who is authorized to solicit and distribute, the rule leaves employees unable to determine whether *they* are “unauthorized persons” prohibited from solicitation or distributing to patients or visitors at any time—a broader restriction than the Act allows.)

Employers may ban solicitation in working areas during working time but may not extend such bans to working areas during nonworking time. See, e.g., *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987) (“[A]n employer may not generally prohibit union solicitation . . . during nonworking times or in nonworking areas.”) (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112–113 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945)). However, the Respondent's rule also prohibits solicitation in work areas, and does

so without qualification. Fairly read, an employee would reasonably understand the rule to ban solicitation or distribution in work areas during nonworking time which is undefined and overly broad and ambiguous. Moreover, banning solicitation or distribution during working hours is overbroad and presumptively invalid, as it would reasonably be construed as prohibiting such conduct during break times or periods when employees are not actually working while being present in working areas. *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994). The Respondent's stated justification for the rule—protecting customers' and employees' safety and to protect Respondent's productivity of its employees does not extend to Respondent's call center or warehouses where Taylor offered no business justifications and falls short at Respondent's retail stores—does not apply to the ban on activity which occurs during nonwork time in working areas.

Once again, while an employer may ban solicitation or distribution in work areas during actual worktime, an employer may not extend the ban to work areas during nonworking time. *Grill Concepts Services, Inc.*, 364 NLRB No. 36, slip op. at 26-27 (2016); *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295, 1296 (2011); *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983). There is no evidence that Respondent's defined work areas or made it clear to employees that this rule does not extend to solicitation in working areas during their own nonworking time. The unlawfulness of this rule probably explains why Respondent revised and clarified this rule in its amended 2020 Handbook. See GC Exh. 2 at 18; R Exh. 1 at 25-25. I further find this Solicitation and/or Distribution rule unlawfully prohibits Section 7 activity and violates Section 8(a)(1) of the Act.

#### V. RESPONDENT'S OTHER AFFIRMATIVE DEFENSES LACK MERIT

I deny Respondent's request for attorney fees and costs as I find merit in two of the three claims brought forward in the Acting General Counsel's complaint against Respondent's three challenged rules. I also reject Respondent's argument that the charge in this case questioning the Proprietary and Confidential Information and the Solicitation and Distribution Rules were filed too late to be properly adjudicated here as I find that these challenged rules remained in existence until January 20, 2020, and, as such, were a continuing violation under the Act to the extent I find them unlawful as discussed above.

Finally, Respondent argues that the Acting General Counsel's claim for relief - a cease-and-desist order regarding Respondent's unlawful Solicitation and/or Distribution rule would only confuse Respondent's employees and this remedy is somehow mooted out by Respondent's issuance of its 2020 Handbook which no longer contains the unlawful rule. (R Br. at 27-29.) The Acting General Counsel counters this argument explaining that “[f]or a repudiation to serve as a defense to an unfair labor practice finding, “it must be timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct.” *Alternative Cmty. Living, Inc.*, 362 NLRB 435, 436 (2015) quoting *Casino San Pablo*, 361 NLRB 1351, 1353 (2014). Additionally, there must be adequate publication of the repudiation to the employees involved and the repudiation must assure employees that, going forward, the employer will not interfere with the exercise of their Section 7 rights. *Id.*, citing *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978).” (GC Br. at 16.)

Here, I find that Respondent did not cure its violation of Section 8(a)(1) by issuing a revised 2020 Handbook that deleted the unlawful Solicitation and/or Distribution rule at issue. The 2020 Handbook continues to contain the unlawful Proprietary and Confidential Information Rule and Respondent did not effectively repudiate the unlawful handbook rules simply by issuing a revised 2020 Handbook that only revised the Solicitation and/or Distribution rule. In order to cure its violation, Respondent would have been obligated, at a minimum, to clarify for its employees that they have a Section 7 right to solicit union support and no evidence was presented that this occurred. Moreover, the revocation of the overly broad rule in this case was not free from other illegal conduct. Respondent continued to illegally put forth its Proprietary and Confidential Information Rule in its revised 2020 Handbook. See *DaNite Holdings, Ltd.*, 356 NLRB 975, 981 (2011)(Same.)

### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has unlawfully interfered with employees' exercise of their NLRA rights in violation of Section 8(a)(1) of the Act by maintaining the following rules in its employee handbook and manual:

#### (a) "PROPRIETARY AND CONFIDENTIAL INFORMATION

- Confidential information includes, but is not limited to, information from employee personnel files; financial information about [Respondent; Respondent's] policies, procedures, and training materials; product testing information and analysis, and information from and about [Respondent's] customers, including all personally identifiable information . . . .
- This policy shall include events and circumstances that involve . . . its employees."  
(GC Exh. 1(c); GC Exh. 1(g); and GC Exh. 2 at 17-18.)

#### (b) "SOLICITATION AND/OR DISTRIBUTION

[...]

- With respect to employee activity, Harbor Freight Tools prohibits all solicitation activities in Harbor Freight Tools' work areas for any purpose, including without limitation, for the purpose of financial gain, subscriptions, lotteries, or charities, religious or political causes, memberships, outside organizations, or other personal matters unrelated to employment with Harbor Freight Tools. Employees may solicit co-workers about causes, interests, political issues, and membership during breaks or lunches and other non-

working time in non-work areas, so long as employees do not disrupt or interfere with ongoing Harbor Freight Tools operations or harass other employees.

[...]

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

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent did not unlawfully violate Section 8(a)(1) of the Act with respect to its Social Media and Networking guidelines policy or in any other way as alleged in the complaint in this matter.

#### **REMEDY**

Having found that the Respondent has engaged in certain unfair labor practices, I find that they must cease and desist such practices and take certain affirmative action designed to effectuate the policies of the Act. In a typical case involving unlawful workplace rules, the promulgator of the rules is ordered to rescind the unlawful provisions, provide inserts of revisions to the employee handbooks and manual and post an appropriate notice at all of Respondent’s nationwide facilities.

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order.<sup>14</sup>

#### **ORDER**

The Respondent, Harbor Freight Tools USA, Inc., at all of its facilities nationwide, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Maintaining the following unlawful employee handbook and manual rules that state that:

(i) “ **PROPRIETARY AND CONFIDENTIAL INFORMATION**

- Confidential information includes, but is not limited to, information from employee personnel files; financial information about

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<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[Respondent; Respondent’s] policies, procedures, and training materials; product testing information and analysis, and information from and about [Respondent’s] customers, including all personally identifiable information . . . .

- This policy shall include events and circumstances that involve . . . its employees.”

**(ii) “SOLICITATION AND/OR DISTRIBUTION**

[...]

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

[...]

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

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the following provisions located in Respondent’s employee handbook and manual:

**(i) “ PROPRIETARY AND CONFIDENTIAL INFORMATION**

- Confidential information includes, but is not limited to, information from employee personnel files; financial information about [Respondent; Respondent’s] policies, procedures, and training materials; product testing information and analysis, and information

from and about [Respondent's] customers, including all personally identifiable information . . . .

- This policy shall include events and circumstances that involve . . . its employees.”

(ii) **“SOLICITATION AND/OR DISTRIBUTION**

[...]

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

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

and remove such rules from any and all employee publications or documents to which it is a party.

(b) Furnish all Respondent employees with inserts for the current policies that (1) advise employees that the unlawful prohibition or restriction has been rescinded, or (2) provide the language of a lawful prohibition or restriction, or to the extent that the Respondent has not already done so, publish and distribute revised policies that (1) do not contain the unlawful prohibition or restriction, or (2) provide the language of a lawful prohibition or restriction.

(c) Within 14 days after service by the Region, post at all of Respondent's facilities, copies of the attached notice marked “Appendix.”<sup>15</sup> Copies of the notice, on forms provided by the

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<sup>15</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall also be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. March 12, 2021



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Gerald Michael Etchingham  
Administrative Law Judge

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

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

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

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

#### PROPRIETARY AND CONFIDENTIAL INFORMATION

- Confidential information includes, but is not limited to, information from employee personnel files; financial information about [Respondent; Respondent's] policies, procedures, and training materials; product testing information and analysis, and information from and about [Respondent's] customers, including all personally identifiable information . . . .
- This policy shall include events and circumstances that involve . . . its employees.

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

#### SOLICITATION AND/OR DISTRIBUTION

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

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

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

**HARBOR FREIGHT TOOLS USA, INC.**

(Employer)

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

**By:** \_\_\_\_\_

(Representative)

(Title)

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

2600 North Central Avenue  
Suite 1400  
Phoenix, AZ 85004

**Telephone:** 602-640-2160

**Hours of Operation:** 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at <http://www.nlr.gov/case/28-CA-232596> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer (602) 416-4755.