UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

UNITED STATES POSTAL SERVICE

and Case 12-CA-316287

KELLMAN KIRKCONNELL, an Individual

UNITED STATES POSTAL SERVICE

and Case 12-CA-330861

KEREN WILLIAMS, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING BRIEF

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I. INTRODUCTION AND STATEMENT OF THE CASE[1]

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, the undersigned Counsel for the General Counsel files the following Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Supporting Brief.

The hearing in the above-captioned proceeding was held on June 24, 2025, in Tampa, Florida, before the Honorable Benjamin W. Green (the ALJ). On May 6, 2026, the ALJ issued his Decision and Order (ALJD) finding that the United States Postal Service (Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) when it disciplined Kellan Kirkconnell (Kirkconnell) and Keren Williams (Williams) because they engaged in protected concerted activities and pursuant to work rules that are overbroad under *Stericycle* and/or facially valid work rules unlawfully applied; created the impression among employees that their protected concerted activities are under surveillance; told employees that they are not permitted to post anything on social media related to work; directed employees to remove social media posts that constitute protected concerted activity; threatened employees with reprisals because they engaged in protected concerted activities; and directed employees not to engage in the protected activity of taking a picture of their working conditions. [ALJD 2:9-11, 15:26-27, 23:26-29, 25:21-24, 34:32-33, 37:24-26, 37:48-50, 38:8-51]. On July 20, 2025, Respondent filed exceptions to the ALJD.

Contrary to Respondent's contentions, the ALJ correctly concluded that Respondent unlawfully applied its rules to discipline Kirkconnell and Williams because they engaged in union and/or protected concerted activity. The ALJ also correctly concluded that Respondent's Behavior

[1] The ALJ's decision will be identified as "ALJD (page number and line)." The hearing transcript is cited as "Tr. (page number)." The parties' Joint Exhibits, General Counsel's Exhibits, and Respondent's Exhibits are cited as "JX (number)," "GCX (number)," and "RX (page number)," respectively. Respondent's brief will be referred to as "RB (page number)."

and Personal Habits Policy and Management Instruction AS-882-2011-6 on Postal Service Use of Retail and Cell Phone Cameras are facially unlawful under *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 2, 9-10 (2023). However, as discussed in detail below, both rules are facially lawful under the standard proposed by the General Counsel. Further, the ALJ correctly concluded that Respondent unlawfully applied its rules to discipline Kirkconnell and Williams because they engaged in union and/or protected concerted activity.

II. STATEMENT OF FACTS

A. Background

Respondent provides postal services for the United States and operates various facilities throughout the United States performing that function, including its Gainesville Sorting and Delivery Center (the Gainesville S&DC) in Gainesville, Florida, and its Mid-Florida Florida Processing & Distribution Center (the Mid-Florida P&DC) in Lake Mary, Florida. [ALJD 5:37, 25:30; GCX 1(i), par. 2(a); GCX 1(n), par. 2(a)]. Kirkconnell has been employed as a rural letter carrier at the Gainesville S&DC since early October 2015, where he is represented by the National Rural Letter Carriers' Association (the NLRLCA). [ALJD 5:36-38; Tr.18, 28]. Williams has been working as a mail handler at the Mid-Florida P&DC since December 2020, where she is represented by National Postal Mail Handlers Union, Local 318 (Local 318). [ALJD 25:29-31; Tr. 18-19, 60].

Respondent and Local 318 are parties to a collective-bargaining agreement that contains the following provisions in Article 14 of that agreement [ALJD 25:33-34; Tr. 65-66, GCX 7]:

> Section 14.1 Responsibilities
> It is the responsibility of management to provide safe working conditions in all present and future installations and to develop a safe working force. . . .

[ALJD 25:36-41; GCX 7].

> Section 14.2(A) Cooperation
> The Employer and the Union insist on the observance of safe rules and safe procedures by employees and insist on correction of unsafe conditions. . . . If an employee believes he/she is being required to work under unsafe conditions, such employees may: a) notify the employee's supervisor who will immediately investigate the condition and take corrective action if necessary; b) notify such employee's steward, if available, who may discuss the alleged unsafe condition with such employee's supervisor; c) file a grievance at Step 2 of the grievance procedure within fourteen (14) days of notifying such employee's supervisor if no corrective action is taken during the employee's tour; d) and/or make a written report to the Union representative from the local Safety and Health Committee who may discuss the report with such employee's supervisor. . . .

[ALDJ 25:43-54, 26:1-7 GCX 7].

B. Respondent's Policies and Instructions

i. Employee and Labor Relations Manual

Respondent's Employee and Labor Relations Manual (the ELM) contains the following provisions:

> 665.11 Loyalty
> Employees are expected to be loyal to the United States government and uphold the policies and regulations of the Postal Service.
>
> 665.13 Discharge of Duties
> Employees are expected to discharge their assigned duties conscientiously and effectively.
>
> 665.15 Obedience to Orders
> Employees must obey the instructions of their supervisors. If an employee has reason to question the propriety of a supervisor's order, the individual must nevertheless carry out the order and may immediately file a protest in writing to the official in charge of the installation or may appeal through official channels.
>
> 665.16 Behavior and Personal Habits
> Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of

> good character and reputation. The Federal Standards of Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary action against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute.
>
> 667.34 Protection Responsibilities
> Employees must protect all information about individuals, customers, and other Restricted Information, and all National Security Information against unauthorized use and disclosure.

[ALJD 3:10-46; GCX 1(i), pars. 4(a) and 4(b); GCX 1(u), pars. 4(a) and 4(b); JX 1].

ii. Management Instruction AS-882-2011-6

Respondent maintains the following provision in its Management Instruction AS-882-2011-6 (MI AS-882-2011-6):

> Handheld and Cell-Phone Cameras: Cameras or cell-phone camera functions may not be used by Postal Service employees or contractors in restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, or any other areas unless approved by an area or headquarters vice president or his or her designee for business purposes. Cameras or cell phones used as cameras in violation of this prohibition may be subject to temporary confiscation.

[ALJD 4:52-44, 5:3-5; GCX 1(n), par. 4; GCX 1(v), par. 4; JX 2, page 3].

C. Kirkconnell Engages in Protected Concerted Activity in Response to Respondent's Rural Route Evaluation System

Every two or four years, Respondent reevaluates the pay of every rural letter carrier pursuant to a rural route carrier evaluation system (RRC system) agreed to by the labor organizations representing the rural letter carriers and Respondent. Each rural letter carrier's evaluation is set forth in Form 4241-A. [ALJD 5:52-54, 6:3, 31-35].

On various social media platforms, including TikTok, Kirkconnell has a following under the name "Kellman Explores," a channel featuring Kellman's travels. [ALJD 5:40-42; Tr. 51-53]. On April 1, 2023, Kirkconnell learned that pursuant to the April RRC system evaluation, his salary would be reduced by about $11,000-$12,000 annually and that he would be required to work an additional day biweekly. [ALJD 5: 52-54, 6:3-54; Tr. 19; GCX 2; GCX 3]. As the other rural letter carriers at the Gainesville S&DC received their Form 4241-A that morning, Kirkconnell witnessed his coworkers' reactions and saw that they were as upset as he was. Some of the rural letter carriers were even walking out of the building in tears. [ALJD 6:40-41, 45-46; Tr. 20]. Instead of walking out with other rural carriers, Kirkconnell decided to record and post a TikTok video on his channel to tell his approximately 8,000 followers, some of whom are also rural letter carriers, about the April RRC and its impact on rural carriers' salaries and hours of work. [ALJD 6:46-48; Tr. 20, 21, 22, 48; GCX 2]. Kirkconnell thought that the public and newer rural letter carriers should know about the RRC system and its ramifications and was reaching out to other rural carriers and those who could help. [ALJD 6:51-54; Tr. 50]. Kirkconnell recorded the video on the workroom floor. Part of the workroom floor and two employees could be seen in the video, but no names or addresses on correspondence were visible. Kirkconnell included a close-up view of his Form 4241-A, showing his "salary" and "guaranteed salary." [ALJD 7:23; Tr. 22; GCX 2]. Prior to the April RRC system evaluation, Kirkconnell had not posted on "Kellman Explores" about Respondent, union business, or his work. [ALJD 5:42-44; Tr. 51-53].

When Kirkconnell finished his route that day, he checked his phone and discovered that he had a lot of responses to his TikTok video, including one from a rural letter carrier in another state. [Tr. 22; GCX 3]. While parked on the side of the road in his postal vehicle, Kirkconnell recorded and posted a TikTok video in response to the out of state rural letter carrier whose salary had also

been reduced. [ALJD 7:26-30; Tr. 22, 23; GCX 3]. The video shows the comment to which Kirkconnell was responding above a close-up of his face, while sitting in his truck. No mail can be seen in the video. [ALDJ 7:40-43; GCX 3].

D. Respondent Orders Kirkconnell to Take Down His April 1 TikTok Videos

On April 4, 2023, Supervisor Customer Service Relief Monica Duncan (SDO Duncan) insisted on meeting with Kirkconnell, despite his concerns about meeting alone with her. [Tr. 28]. SDO Duncan immediately demanded that Kirkconnell take down the TikTok videos he posted on April 1. [ALJD 7:47-54, 8:3; Tr. 28]. After reiterating his request for a Union representative, SDO Duncan eventually got in touch with Union President Marion Schroeder, and explained the situation. Schroeder told Kirkconnell that if he recorded a video in the building, he needed to take it down, regardless of what other workers had done in the past. (ALJD 8:3-20; Tr. 30, 31]. Kirkconnell agreed to remove the videos. He set them to private and they were no longer accessible, as confirmed by SDO Duncan. [ALJD 8:17-19; Tr. 32-33, 139]. Kirkconnell returned to work. [ALJD 19-20; Tr. 32-33, 139].

E. Kirkconnell Posts a TikTok Video on April 4 to Address the Removal of His April 1 Videos

On April 4, 2023, after getting home from work, Kirkconnell noticed he had a lot of messages expressing concerns about the removal of the April 1 videos. [Tr. 32]. From his porch, Kirkconnell recorded and posted a video on TikTok addressing some of the concerns and informing his followers that he was asked by Respondent and NRLCA to remove the videos. Kirkconnell also expressed his appreciation for their support and making people aware of what's been happening. [ALJD 8: 35-47; Tr. 33, GCX 4].

Even though, Kirkconnell's TikTok account was monetized after the response generated by his April TikTok videos, that was not his intention when he posted the videos. [ALJD 5:46-50; Tr.

161]. Additionally, Kirkconnell was not compensated for any of the April TikTok videos because they were less than a minute long. [ALJD 5:49-50; Tr. 161].

F. Respondent Responds to Kirkconnell's April 4 TikTok Video

On April 5, 2023, SDO Duncan informed Kirkconnell that she wanted to meet with him. After insisting on having someone else present, Kirkconnell asked Customer Service Supervisor Jasmine Andrews (CSS Andrews) to be present. CSS Andrews reluctantly agreed. [ALJD 8:49-54; Tr. 35; GCX 1(i), par. 3; GCX 1(u), par. 3]. SDO Duncan asked Kirkconnell about the April 4 video and told him that he needed to take down that video as well. [ALJD 9:3-4; Tr. 36]. Kirkconnell asked why, since he had recorded the video at home and had said nothing about the Post Office. [ALJD 9:4-6; Tr. 36]. SDO Duncan repeated that the video had to come down. [ALJD 9: 8-9Tr. 36]. When Kirkconnell asked if he could post about stamps, SDO Duncan replied that he needed to watch out because he was being watched, as well as anything he posted. [ALJD 9:10-12 Tr. 37]. Kirkconnell then set the April 4 video to private and SDO Duncan confirmed it. [ALJD 9:12-13; Tr. 37].

G. Respondent Issues Kirkconnell a Notice of Removal

On April 6, 2023, SDO Duncan met with Kirkconnell and Union Steward Smith to conduct an investigative interview about Kirkconnell's TikTok videos. [ALJD 9:31-54, 10: 3-9; Tr. 37-38, 140-142; RX 3]. On April 11, 2023, SDO Duncan completed a Discipline Action Request (DAR) recommending that Kirkconnell be removed from the Postal Service. [ALJD 10:11-13; RX 3]. On about April 15, 2023, SDO Duncan handed Kirkconnell a Notice of Removal, which charged him with improper conduct for filming and posting an unauthorized video from inside the Postal facility to social media. The notice alleged that Kirkconnell's actions violated several rules in the Employee and Labor Relations Manual, including requirements for loyalty, conscientious

discharge of duties, obedience to orders, proper behavior and personal habits, and protection of customer information (ELM 665.11, 665.13, 665.15, 665.16, and 667.34). Management argued that these actions destroyed the trust necessary for employment and warranted removal from the Postal Service. [ALJD 11:22-23; Tr. 38-40; RX 3]. Pursuant to a grievance settlement, the Notice of Removal was reduced to a 7-Day Suspension. [ALJD 12:25-46; Tr. 40; GCX 6].

H. Williams Engages in Protected Activity When She Photographs Hazardous Working Conditions

On or about October 21, 2023, Mid-Florida P&DC Manager of Distribution Operations Lakisha Johnson (MDO Johnson) asked mail handler Keren Williams to work overtime. Williams agreed and SDO Johnson instructed Williams to take her 15-minute break before returning to work. [ALJD 26:41-42; Tr. 61-62; GCX 1(n), par. 3; GCX 1(v), par. 3]. On her way to the bathroom, as she was finishing her break, Williams saw Supervisor Distribution Operations Racquel Jordan (SDO Jordan) and mail handler Jaquan Skeete (Skeete) at the ADUS machine. Williams also saw that there was mail everywhere on the floor. When Williams returned to work at the ADUS machine, SDO Jordan and Skeete left, and there was still mail everywhere on the floor. [ALJD 26:45-50; Tr. 62-63]. Williams then went over to side 2 of the ADUS machine and asked mail handler Peter Thompson (Thompson) to call Manager Distribution Operations Paul Olbeter (MDO Olbeter). [ALJD 26:50, 27:3; Tr. 61-62, 64; GCX 1(n), par. 3; GCX 1(v), par. 3]. Thompson paged MDO Olbeter, but he did not respond and Williams returned to her side of the ADUS machine and started cleaning up the area. [ALJD 27:3-4; Tr. 64-65]. SDO Jordan then approached Williams and asked if there was a problem and Williams replied that the area was a mess. SDO Jordan then instructed Williams to go home. [ALJD 27:4-6; Tr. 65]. After Williams confirmed that SDO Jordan was sending her home, she took a photograph of her workstation to show to MDO Jenkins, gathered her belongings, and left the area. [ALJD 27:6-8; Tr. 65]. Williams testified that she relied

on Article 14 of the collective bargaining agreement, which instructs employees to report unsafe working conditions to their supervisors, when she decided to take a picture of her workstation. [ALJD 27:8-12; Tr. 65; GCX 7].

I. Respondent Instructs Williams Not to Take Pictures of Working Conditions

On her way out of the Mid-Florida P&DC, Williams saw MDO Jenkins and approached her to explain what transpired at the ADUS machine. Williams told MDO Jenkins that there was mail everywhere, that it was hazardous, and showed her the photograph she had taken of the work area. [ALJD 27:29-32; Tr. 66]. Although shocked by what Williams showed her, MDO Jenkins told Williams that she could not take pictures. [ALJD 32-34; Tr. 66]. MDO Jenkins instructed Williams to delete the photo and Williams agreed. [ALJD 27:34-35; Tr. 67].

As Williams made her way toward the exit of the facility, MDO Olbeter and SDO Jordan approached her. Williams told MDO Olbeter that she paged him, and he said that he was in a meeting. Williams wanted to let him know that her work floor was a mess and hazardous. MDO Olbeter told Williams that SDO Jordan reported that she had taken a picture, which was against Postal policy and needed to be deleted. Williams said she was not aware of such policy and that she had already deleted the photograph. [ALJD 27:38-41; Tr. 67-68].

J. Respondent Disciplines Williams

On October 25, 2023, SDO Jordan conducted an investigative interview of Williams, with MDO Olbeter and Shop Steward Michael (last name unknown] present. MDO Olbeter told Williams that it was against Postal policies to take pictures. Williams said she did not know that and explained that she took the picture to report the hazardous conditions to SDO Jenkins, since SDO Jordan had left her there alone. [ALJD 28:15-18; Tr. 70].

On October 30, 2023, SDO Jordan prepared and submitted to Respondent's labor department a DAR for Williams' proposed removal. [ALJD 28:20-21; Tr. 96; RX 2, pp. 4-6]. The DAR included two narratives of the events on October 21, 2023, memoranda reflecting SDO Jordan's interview notes, a handwritten statement from mail handler Grazini that Williams stopped him from picking up the mail because she needed to record a video for her lawyer to sue Respondent,[2] and disciplinary documents regarding a previous letter of warning issued to Williams on December 20, 2022. [ALJD 28:20-26; Tr. 96; RX 2, pp. 7-8 and 26-62].

On November 29, 2023, SDO Jordan called Williams to MDO Olbeter's office and issued her a Notice of Removal for recoding a video in the post office, in violation of Postal policies, including parts 665.13 and 665.16 of the ELM and MI AS-882-2011-6. [ALDJ 28: 28-29, 29:46-49; Tr. 71; GCX 8]. Williams told SDO Jordan that she did not record a video. [Tr. 71]. Nevertheless, Williams was told that she was being removed from the post office, effective December 22, 2023. [ALJD; 31-32; Tr. 71-72; GCX 8]. SDO Jordan then asked Williams for her ID and timecard and told her to leave. [Tr. 72, 74]. Williams left as instructed. [Tr. 72].

Williams filed a grievance claiming that Respondent violated Articles 16 and 19 of the National Agreement when management issued her a Notice of Removal for Improper Conduct. [ALJD 30:51; Tr. 73, 82; GCX 9]. On January 31, 2024, the parties settled the grievance by reducing the Notice of Removal to a Seven-Day paper suspension that would remain in Williams' file for 16 months. The parties also agreed that Williams would receive a one-time lump sum payment of $1,501.96. [ALDJ 31:26; Tr. 73, 82; GCX 9].

[22] Respondent contends that the ALJ should have credited Grazini's written statement. Respondent had the opportunity to call Grazini as a witness during the hearing but failed to do so and the ALJ appropriately chose to give no weight to the statement.

From November 29, 2023, through the effective date of her removal on December 22, 2023, Williams received her regular compensation. After the effective date of her removal, Williams was placed on leave without pay. [Tr. 74]. Williams was on leave without pay from December 22, 2023, until she returned to work in February 2024. [Tr. 74; GCX 8]. Williams was removed from work for a period of about five weeks, for which she was not compensated and the grievance settlement lump sum payment $1,501.96 was not sufficient to make her whole. [Tr. 74, 82, 83].

III. ARGUMENT

A. Respondent violated Section 8(a)(1) of the Act when it disciplined Kirkconnell for engaging in protected concerted activities as found by the Administrative Law Judge. Respondent's Exceptions 5 and 6 are without merit.

The ALJ correctly found that Kirkconnell engaged in protected concerted activity when he posted the April TikTok videos in response to Respondent's April RRC system evaluation. [ALJD 16:29-30]. Section 7 of the Act gives employees the right to "engage in other *concerted* activities for the purpose of collective bargaining or other *mutual aid or protection*." 29 U.S.C. § 157 (emphasis added). For an employee's activity to be protected, it must be concerted and undertaken for the purpose of mutual aid or protection. Activity is generally "protected" when it relates to employees' wages, hours, and other terms and conditions of employment. *Senior Citizens Coordinating Council of Riverbay Community Inc.*, 330 NLRB 1100, 1103 (2000). The ALJ properly found, and Respondent did not refute, that Kirkconnell's activity related to wages and terms of employment. [ALJD 16:6-7].

The ALJ correctly found that Kirkconnell engaged in concerted activity when he posted the TikTok Videos. [ALJD 16:29-30]. Whether an employee's activity is "concerted" depends on whether the employee's actions are linked to those of other employees and whether an employee's activity is for the purpose of mutual aid and protection depends on whether the employee's goal is

linked to the goals of other employees. *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 2-3 (2019); *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 152-153 (2014). In *Meyers Industries*, 268 NLRB 493, 497 (1984) *(Meyers I)*, the Board held, "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." In *Meyers Industries, Inc.*, 281 NLRB 882, 887 (1986) (*Meyers II)*, the Board explained that an individual employee's activity will be found concerted, even if not specifically authorized, where the totality of the record evidence demonstrates that the activities at issue are group activities. Thus, an employee's activities will be found concerted where the employee "brings truly group complaints to the attention of management." *Id.* at 887. Here, the ALJ found that Kirkconnell's TikTok videos were protected concerted activity because Kirkconnell noted that the salary of many rural letter carriers, including his own, was being reduced and that some walked out as a result. Kirkconnell's language in the video, stating "**we**" were just told that "a lot of **us** are losing money with **our** new pay system" (emphasis added), establishes the concerted nature of his message. [ALJD 16:29-36].

Additionally, contrary to Respondent's claim, the ALJ properly concluded that Kirkconnell engaged in concerted activity even if his videos resulted in the monetization of his TikTok account.[3] [ALJD 17:18-23]. Respondent failed to present evidence that Kirkconnell posted the April TikTok videos to increase his followers and monetize his account and Kirkconnell credibly testified that was not his intention. Regardless of his motivation, Kirkconnell was communicating with other employees about significant changes to their terms and conditions of employment.

[3] There is no evidence that Kirkconnell was paid for his videos and his videos were not compensable because they were less than one minute long.

The April 1 TikTok video was also for mutual aid or protection. Although the video addressed Kirkconnell's own wage and schedule situation, it also mentioned the impact on coworkers. The reevaluations impacted rural letter carrier pay and schedules nationwide. Kirkconnell's use of the April 1 TikTok video, which widely disseminated the information about Respondent's wage and schedule changes, further evinces that he was seeking broad public support that could inure to the benefit of other Postal Service employees. See *Fresh & Easy*, 361 NLRB at 155-156 & n.18 (employee's solicitation of support from other employees to support her workplace sexual harassment claim was for mutual aid or protection because, *inter alia*, it inured to the benefit of all employees). See generally *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-68 (1978) (mutual aid or protection clause covers employees' efforts to improve their lot as employees "through channels outside the immediate employee-employer relationship"). Employees have the right to use social media to communicate with each other and with the public in furtherance of their Section 7 rights. *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014), *enfd. mem. sub nom. Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2d Cir. 2015). Thus, the ALJ correctly found that Kirkconnell attempted to and did communicate with other rural letter carriers regarding an issue of mutual concern. [ALJD 17:10-11].

The ALJ properly concluded that Kirkconnell did not lose the protection of the Act under the Board's totality-of-the circumstances test applicable to social media posts. [ALJD 21:45-47]. *See, e.g., Pier Sixty, LLC*, 362 NLRB 505, 506-08 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017) (applying a totality-of-the-circumstances test to find protected an employee's off-duty, off-site social media posts that used obscenities and disparaged a manager's family); *Lion Elastomers, LLC*, 372 NLRB No. 83, slip op. at 10-11 (2023), *vacated and remanded*, 108 F. 4th 252 (5th Cir. 2024). Under that test, the Board examines: (1) whether the record contained any evidence of the

employer's antiunion hostility; (2) whether the employer provoked the employee's conduct; (3) whether the employee's conduct was impulsive or deliberate; (4) the location of the social media post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the employer considered language similar to that used by the employee to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon the employee was typical of that imposed for similar violations or disproportionate to the employee's offense. *Pier Sixty*, 362 NLRB at 506.[4]

The ALJ correctly found that most of the relevant factors are met here, as the video concerned wages and schedules; it was motivated by Respondent's reevaluation; it was spontaneous and posted to Kirkconnell's personal TikTok account; it contained no offensive language; Respondent harbored animosity towards Kirkconnell's protected concerted activity, and Respondent failed to identify a specific rule forbidding an employee from posting a public statement on social media regarding customers' mail delivery or a rule forbidding employees from spending less than a minute of work time in a work area discussing their terms of employment. [ALJD 17:41-53, 18:4-50, 19:3-54, 20:3-39, 21:3-54, 22:4-25].

The ALJ properly found that Respondent, as established by SDO Duncan's statements, harbored hostility towards Kirkconnell's protected concerted activity. [ALJD 18:7-17]. SDO Duncan told Kirkconnell that the concerns he raised tarnished Respondent's brand. SDO Duncan admitted that she believed that Kirkconnell was not allowed to post his own Form 4241-A, which

[4] The General Counsel disagrees with the Board's decision in *Lion Elastomers*, *LLC II*, 372 NLRB No. 83 *vacated and remanded*, 108 F.4th 252 (5th Cir. 2024), because it has led to the protection of generally prohibitable employee conduct that is tenuously connected with rights protected under the Act and intends to urge the Board to overturn it.

contained his salary. SDO Duncan prohibited Kirkconnell from engaging in protected concerted activity and threatened him with reprisals for doing so.

Kirkconnell's videos were not "so disloyal, reckless or maliciously untrue as to lose the Act's protection." *MasTec Advanced Technologies*, 357 NLRB 103, 107 (2011) (citing *Mountain Shadows Gold Resort*, 330 NLRB 1238, 1240 (2000)), *enforced*, 837 F.3d 25 (D.C. Cir. 2016). Contrary to Respondent's assertion, the video did not disparage Respondent's product or encourage the public to boycott Respondent's services; rather, it criticized Respondent's changes to its employees' pay and schedules. While viewers may learn about Respondent's employment practices and decide not to do business with it as a result, that is true of almost every concerted effort among employees to improve their working conditions. Moreover, to the extent Kirkconnell described coworkers walking out of the facility and customers possibly not receiving mail that day, the statement was not "so disloyal" as to lose the Act's protection. Viewed in context, the video clearly was designed to call attention to employees' dissatisfaction with Respondent's labor practices and how they could affect customers. Third parties would reasonably understand the video was not intended to inflict harm on Respondent independent of the labor dispute, and it was not excessively inflammatory in its description of Respondent. Compare *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 231 (1980) (letters to customers of commercial aircraft refueling company implying that employer engaged in unsafe practices that could be "hazardous" for customers or cause a "tragedy" were sufficiently related to ongoing labor disputes regarding employee discipline and job classifications to retain the Act's protection, even though the union had not raised these specific safety issues with the employer), *enforced mem.*, 636 F.2d 1210 (3d Cir. 1980), with *Five Star Transportation, Inc.*, 349 NLRB 42, 46 (2007) (driver-employee letters did not constitute Section 7-protected activity because they characterized the employer as a sub-standard company

that was "so reckless that they have employed alcohol abusers, drug offenders, child molesters, and persons that have had their [driving] license suspended" and "implicate[d] the safety of children, not the common concerns of employees"), *enforced*, 522 F.3d 46 (1st Cir. 2008).

The April 1 TikTok video did not contain statements that were "reckless or maliciously untrue." Kirkconnell accurately informed the viewers about changes to his and his coworkers pay and schedules. Kirkconnell's statement speculating that some mail may not be delivered on April 1 did not identify any customer or route that was in danger of not receiving mail. Kirkconnell simply expressed a possible consequence of Respondent's changes to its workers' terms and conditions of employment.

Kirkconnell did not engage in an unprotected walkout or encourage his coworkers to walk out. Rather, he accurately depicted his observation of employees leaving the facility in anger and there is no evidence that a work stoppage occurred. Contrary to Respondent's assertion, the video does not show customer information. For a couple of seconds, addresses are visible, but the video does not show names associated with those addresses or any private mail associated with those addresses. The only "private" information shown was Kirkconnell's own salary. As to Kirkconnell recording a video on federal property while working, the ALJ correctly found that Kirkconnell's Notice of Removal did not reference any rule that specifically prohibits employees from engaging in any nonwork activity on work time. [ALJD 20:18-20]. Respondent did not present any evidence that other employees have been disciplined for spending less than a minute of work time in a work area doing something other than work. Respondent failed to raise a colorable defense under *NLRB v. Burnup & Simps*, 379 U.S. 21 (1964), and it did not meet its burden under that standard of showing that it had an "honest belief" that Kirkconnell engaged in misconduct because the video—which can be paused and reversed to be studied closely—clearly does not show names or private

mail associated with visible addresses. And, even if Respondent could demonstrate such honest belief, the video evidence clearly meets the General Counsel's burden of showing that Kirkconnell did not, in fact, engage in the alleged misconduct.

B. The ALJ correctly concluded that ELM Rule 665.16 is unlawful under the test set forth in *Stericycle*. Exception 4.

In *Stericycle*, 372 NLRB No. 113, slip op. at 2, 9-10 (2023), the Board held that when analyzing the facial validity of work rules, the General Counsel must prove that an employer's rule has a reasonable tendency to chill employees from exercising their Section 7 rights. If an employee, who is understood to be economically dependent on the employer and who contemplates Section 7 activity, could reasonably interpret the rule to be coercive, the General Counsel has carried their burden, and the rule is presumptively unlawful even if there is also a reasonable non-coercive interpretation. *Id.* Although the employer's intent in creating the rule is immaterial, it may rebut the presumption of illegality by proving the rule advances legitimate and substantial business interests that the employer is unable to advance with a more narrowly tailored rule. *Id.*, slip op. at 2, 10.

The first sentence of rule 665.16- Behavior and Personal Habits provides that "[e]mployees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service." An employee who is economically dependent on their employer and contemplating Section 7 activity could reasonably read this sentence as prohibiting them from engaging in union organizing or protected concerted activities that the employer may deem to reflect unfavorably on the employer's business, such as speaking out publicly about terms and conditions of employment. See, for example, *First Transit, Inc.*, 360 NLRB 619, 619 n.5 (2014) (under *Lutheran Heritage*, rule prohibiting conduct that is "detrimental to the company's image or reputation" found unlawful); *Schwan's Home Service*, 364 NLRB 170, 173-74 (2016)

(under *Lutheran Heritage*, rule prohibiting conduct "which is detrimental to the best interests of the company" found unlawful). The rule's next sentence—providing that [a]lthough it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation"—is similarly unlawful, particularly when read in context with the rule's first sentence. An employee could reasonably understand that their employer would view Section 7-protected activity as reflecting poor character and reputation, or showing the employee to be unreliable, untrustworthy, or discourteous from the employer's perspective. See, for example, *Hills & Dales General Hospital*, 360 NLRB 611, 612 (2014) (under *Lutheran Heritage*, rule that employees will "represent [the employer] in the community in a positive way and professional manner in every opportunity" found unlawful). Thus, contrary to Respondent's assertions, the ALJ correctly concluded that rule 665.16 is overly broad under *Stericycle*. However, the General Counsel urges that the Board overturn *Stericycle* and adopt the test discussed below in Section H of this brief and conclude that rule 665.16 is facially lawful.

As to facially valid rules, the Board has long held that "applying a rule or policy to restrict the exercise of Section 7 rights is an unfair labor practice." *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 2 (2021). While rule 665.16 is facially lawful pursuant to the test proposed by the General Counsel, rule 665.16 was still unlawfully applied as a basis to discipline Kirkconnell for engaging in protected concerted activity. Respondent relied on this rule to issue Kirkconnell a Notice of Removal and then a 7-day suspension because of what he said in his videos, statements which the ALJ properly found constituted protected concerted activity.

Thus, the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act by unlawfully applying rule 665.16 to prohibit Kirkconnell from engaging in protected concerted activity and as a basis for removing him from his job. [ALJD 23:26-29].

C. Respondent violated Section 8(a)(1) of the Act by unlawfully applying ELM rules 665.11, 665.13, 665.15, and 667.37 to issue Kirkconnell the Notice of Removal and 7-day suspension. Respondent's Exception 7 is without merit.

In addition to Rule 665.16, Respondent relied on several other ELM provisions, namely the rules on Loyalty (665.11), Discharge of Duties (665.13), Obedience to Orders (665.15), and Protection Responsibilities (667.34), as the basis for issuing the Notice of Removal and 7-Day suspension to Kirkconnell. Although these rules are facially lawful, Respondent unlawfully applied them to discipline Kirkconnell for engaging in protected concerted activity. Each of these provisions concerns general expectations of employee conduct, including loyalty to the Postal Service, conscientious performance of duties, compliance with supervisory instructions, and safeguarding customer information.

As the Board has long held, "applying a rule or policy to restrict the exercise of Section 7 rights is an unfair labor practice." See *AT & T Mobility*, *LLC*, 370 NLRB No. 121, slip op. at 2 (2021). Because the ALJ found that Kirkconnell's social media posts constituted protected concerted activity, and he did not lose the protection of the Act, the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act by unlawfully applying rules 665.11, 665.13, 665.15, 665.16, and 667.34 when issuing the Notice of Removal to Kirkconnell on April 17, 2023, and the 7-day suspension to him on May 3, 2023. [ALJD 23:26-29].

D. Respondent violated Section 8(a)(1) of the Act when it created the impression that employees' protected concerted activities were under surveillance; told employees that they were not permitted to post anything on social media that is related to work; directed employees to remove their social media posts constituting protected concerted activities; and threatened employees with reprisals because they engaged in protected concerted activities. Respondent's Exception 8 is without merit.

On the morning of April 4, Duncan met with Kirkconnell in the shared supervisor's office and told him to remove the protected concerted TikTok videos he had posted the previous day. By doing so, Respondent coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer, via statements or conduct, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000). The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. *Id.*

The Board has long held that discussing compensation is "an inherently concerted activity clearly protected by Section 7 of the Act." *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), enfd. 977 F.2d 582 (6th Cir. 1992). Thus, an employer violates Section 8(a)(1) by prohibiting employees from discussing their salaries, such conduct "has a natural tendency to restrain them in the exercise of their Section 7 right to learn about and assess such a vital term and condition of employment as the salaries paid by their employer." *Id.*, *In re Exterior Systems, Inc.*, 338 NLRB 667 (2002).

In the two TikTok videos that Kirkconnell posted on April 1, he discussed how the new evaluation system affected his wages as well as those of his coworkers and rural letter carriers around the country. SDO Duncan's instruction to remove the videos effectively tells Kirkconnell that he cannot discuss his terms and conditions of employment, including his wages, with others, including his coworkers.

On April 5, Respondent violated Section 8(a)(1) of the Act when SDO Duncan instructed Kirkconnell to remove the TikTok video he had posted in response to inquiries about his April 3 video. During that same conversation, SDO Duncan told Kirkconnell that he needed to watch out because he was being watched. This constitutes unlawful employer surveillance and an unlawful threat of reprisal for engaging in protected concerted activity. See *Mercy Hospital,* 366 NLRB No. 165, slip op. at 2 (2018) (the "relevant inquiry under Section 8(a)(1) is an objective one: whether the employer's statement or actions would tend to coerce a reasonable employee and chill the exercise of that employee's Section 7 rights.") Here, both the clear language that SDO Duncan used and the context in which she made her statements would tend to coerce and chill a reasonable employee. It is noteworthy that the statement occurred in the context of a private meeting initiated by SDO Duncan. When Kirkconnell asked for his steward to be present, SDO Duncan replied, "come on," discouraging such request and allowing only Kirkconnell's direct supervisor to join the meeting. Moreover, SDO Duncan committed another unfair labor practice during the April 5 meeting shortly before uttering the unlawful threat. Kirkconnell asked what he was allowed to post to social media, and SDO Duncan answered that he could not post anything that could be related to work even if he does not mention Respondent or his position. Such a prohibition would chill employees from making a wide range of Section 7-related communications. And in this case, it

did. After the April 5 meeting, Kirkconnell ignored the questions he was receiving and stopped posting on TikTok about what was happening at work.

The ALJ correctly concluded that, by the above-described conduct, Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 6 and 7(a) through 7(e) of the Complaint. [ALJD 25:21-23].

E. Respondent violated Section 8(a)(1) of the Act when it suspended and issued a Notice of Removal and a 7-day Paper Suspension to Williams because she engaged in protected activity. Respondent's Exception 2 is without merit.

The ALJ correctly found that Williams engaged in protected concerted activity when she took a picture of the ADUS machine, pursuant to Article 14 of the CBA. [ALJD 37:8-9]. Under the Board's "*Interboro* doctrine," when an employee asserts rights under a collective-bargaining agreement, the employee's activity is concerted even if the employee acts alone, because the assertion of a collectively bargained right is an integral part of the collective activity that gave rise to the agreement. *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), *enfd*. 388 F.2d 495 (2d Cir. 1967), *affirmed by the Supreme Court in NLRB v. City Disposal Systems, Inc*., 465 U.S. 822 (1984) (employee's refusal to operate a truck based on honest and reasonable belief that truck was unsafe and that he was entitled to refuse to operate it under the collective-bargaining agreement amounted to protected concerted activity).

An employee's invocation of a contractual right is protected even if the employee does not file a formal grievance or invoke a specific provision of the collective-bargaining agreement. *Id*. at 840 (individual safety complaints concerted because rooted in collective-bargaining agreement); *Lorac Construction Services, Inc.,* 318 NLRB 1034, 1035 (1995) (individual complaints about lack of equipment held concerted because grounded in collective-bargaining agreement). It need

only be "reasonably clear" to the person to whom the claim is communicated that the employee is invoking a contractual right. *City Disposal*, 465 U.S. at 840.

Article 14, Section 14.2(A) of the National Agreement states, in part, that Respondent and "the Union insist on the observance of safe rules and safe procedures by employees and insist on correction of unsafe conditions." (GCX 7). Employees have an obligation to report safety issues. (GCX 7). Williams attempted to report the hazardous working conditions at the ADUS to no avail. Williams asked fellow mail handler Thompson to page MDO Olbeter, but MDO Olbeter did not respond. (Tr. 64). When Williams tried to address the situation with SDO Jordan, SDO Jordan told Williams to go home. (Tr. 65). Relying on Article 14 of the National Agreement, Williams then took a picture of the machine to report the issue to MDO Jenkins, her immediate supervisor, who had asked Williams to work overtime. (Tr. 65; GCX 7). Williams explained to MDO Jenkins that her work area was hazardous and showed her the picture of the hazards. As she was leaving the facility, Williams told MDO Olbeter and SDO Jordan that her work area was hazardous and MDO Olbeter indicated that he knew that Williams had taken a photograph. Thus, Respondent knew that Williams was concerned about safety and that she had taken the photograph to document the safety concern and attempt to enforce the terms of the collective-bargaining agreement.

Here, the ALJ found that Williams engaged in protected conduct. [ALJD 37:8-9]. In response to that conduct, Respondent relied on rule MI AS 882-2011-6 to issue a Notice of Removal which was later reduced to a 7-Day paper suspension. Respondent enforced MI AS 882-2011-6 to discipline Williams for engaging in union and protected concerted activity. The ALJ found that Respondent did not show that Williams' conduct in photographing unsafe working conditions interfered with its operation. [ALJD 37:20-23]. Thus, the ALJ correctly concluded that

Respondent violated Section 8(a)(1) of the Act when it issued a Notice of Removal to Williams and then a 7-Day paper suspension, in lieu of removal.[5] [ALJD 37:24-26].

F. The ALJ correctly concluded that MI AS-882-2011-6 is overbroad under *Stericycle.* Respondent's Exceptions 1 and 9.

Section 8(a)(1) prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. 29 U.S.C. § 157. Section 7 protects the right of employees to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. *Id.* The "mutual aid or protection" clause focuses on the goal of concerted activity, specifically whether the employee or employees involved are seeking to improve their terms and conditions of employment or otherwise improve their lot as employees. *Eastex, Inc. v. NLRB*, 437 U.S. at 565.

The Board has long and consistently recognized that an employer's mere maintenance of a work rule may unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. See *Republic Aviation Corp.*, 51 NLRB 1186, 1187 (1943). In *Stericycle*, the Board held that when analyzing the facial validity of work rules, the General Counsel must prove that an employer's rule has a reasonable tendency to chill employees from exercising their Section 7 rights. 372 NLRB No. 113., slip op. at 2, 9-10. If an employee, who is understood to be economically dependent on the employer and who contemplates Section 7 activity, could reasonably interpret the rule to be coercive, the General Counsel has carried their burden and the rule is presumptively unlawful, even if there is also a reasonable non-coercive interpretation. *Id.*

[5] Counsel for the General Counsel excepted to the ALJ's failure to find that Respondent also violated Section 8(a)(1) of the Act when it suspended Williams from on or about November 29, 2023, when she was issued the Notice of Removal, through the effective date of her removal on December 22, 2023, and until her return to work in February 2024.

Although the employer's intent in creating the rule is immaterial, it may rebut the presumption of illegality by proving the rule advances legitimate and substantial business interests that the employer is unable to advance with a more narrowly tailored rule. *Id.*, slip op. at 2, 10.

The Board in *Stericycle* analyzed the no camera policy in *Boeing*, and noted that the *Boeing* holding ignored "the importance of photo or video documentation of unfair labor practices, protected concerted activity, and the like," thus acknowledging that a no camera policy infringed on employees' rights. As such, the burden shifts to the employer to establish that it has a "legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." *Id.*

MI AS 882-2011-6 prohibits employees from using cameras or cell-phone camera functions in mail processing areas or workroom floors unless approved by an area or headquarters vice president or his or her designee. (JCX 2, page 3). While Respondent may have a legitimate interest in maintaining the confidentiality of, for example, customer's addresses and credit card information, and ensuring that its inner workings are not disclosed to the general public for safety and security reasons, there is no legitimate business reason why it should prohibit employees from photographing and recording workplace issues related to their terms and conditions of employment, if they ensure sensitive information is not included in the photograph.

The ALJ found that Williams, pursuant to the collective bargaining agreement between Respondent and Local 318, sought to document the unsafe working conditions at her workstation to show to her immediate supervisor. [ALJD 36 33-36]. When she did that, MDO Jenkins and MDO Olbeter directed Williams not to take pictures of her working conditions.

The ALJ noted that Respondent did not present testimony or documentary evidence showing that its legitimate business interests cannot be addressed with rules that do not interfere

with employees' Section 7 activity. Accordingly, the ALJ properly concluded that under the test set forth in *Stericycle,* Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing MI AS 882-2011-6. [ALJD 34:32-33]. However, as discussed below, MI AS 882-2011-6 is facially lawful pursuant to the test proposed by the General Counsel. Nonetheless, Respondent unlawfully enforced MI AS 882-2011-6 to discipline Williams because she engaged in union and protected concerted activity.

G. Respondent violated Section 8(a)(1) of the Act by directing Williams not to take pictures of working conditions. Exception 3 is without merit.

On October 21, 2023, MDO Jenkins told Williams she was not permitted to take pictures in the facility and instructed her to delete the photograph that Williams had taken to document the unsafe working conditions. Later that same night, MDO Olbeter told Williams that he had heard Williams had taken a photograph and instructed her to delete it. By telling Williams that she was not permitted to take pictures inside the facility and instructing her to delete the picture of the unsafe working conditions, Respondent directed employees not to take pictures of working conditions in violation of Section 8(a)(1) of the Act. In *Stericycle*, the Board stated that:

> [t]aking a picture or recording a video can easily be part of protected activity. For instance, employees might take pictures of a reoccurring unsafe work condition that they then use to document a complaint to management, or they might take photos of a notice a manager posts on the factory floor telling them they may not discuss their pay. In a society where smartphone cameras have become ubiquitous and, accordingly, where there is increased utilization of these devices to document complaints with photographs, audio, and videos, a rule that prohibits the use of cameras has a very definite impact on protected activity.

Id., slip op at fn. 18. The ALJ properly found that by instructing Williams not to take pictures of unsafe working conditions, Respondent interfered with Williams' Section 7 rights, in violation of Section 8(a)(1) of the Act. [ALJD 37:48-50].

H. The Board should overturn *Stericycle* in favor of a balanced and common-sense approach.

While the mere maintenance of the rules in this case is unlawful under the current controlling precedent set in *Stericycle*, that standard is fundamentally flawed. Instead of striking the congressionally mandated balance between safeguarding the rights of employees and rights of employers, the Board in *Stericycle* presumed unlawful interference whenever employer policies potentially interacted with even the most excessively broad interpretations of Section 7. Reinstating the balancing framework from *Boeing Co.*, 365 NLRB 1494 (2017), together with its practical assessment of whether a rule impacts employee rights under Section 7, would restrict only those rules that demonstrably coerce employees while allowing employers to maintain order, comply with legal obligations, and promote productive workplaces.

a. The Act requires a balance between the rights of employees under Section 7 and the rights and duties of employers.

The Board is tasked with faithfully interpreting the Act by ensuring its enforcement remains within the parameters established by Congress. Specifically, the rights guaranteed by Section 7, while vital to the achievement of the national labor policy established by Congress, are not absolute. As the Supreme Court held in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–98 (1945), the law requires "an adjustment between the undisputed right of self-organization assured to employees . . . and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society." Where necessary, the Board has a "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967). *See also NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests

of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"). *Cf. Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (emphasizing the Board's responsibility to balance the effect on Section 7 rights and the employer's asserted business justification). However, the Board abandoned its duty to balance or adjust these rights and interests when it overturned *Boeing* in favor of the current *Stericycle* standard.

b. The Board's decision in Stericycle failed to strike the required balance and compounded that failure by adopting an excessively broad interpretation of Section 7.

In *Stericycle*, the Board held that when analyzing work rules, the General Counsel must prove that an employer's rule has a reasonable tendency to chill employees from exercising their Section 7 rights. 372 NLRB No. 113, slip op. at 2, 9–10. If an employee, who is understood to be economically dependent on the employer and who contemplates Section 7 activity, could reasonably interpret the rule to be coercive, the General Counsel has carried their burden, and the rule is presumptively unlawful even if there is a reasonable non-coercive interpretation. *Id.* Although the employer's intent in creating the rule is immaterial, it may rebut the presumption of illegality by proving the rule advances legitimate and substantial business interests that the employer is unable to advance with a more narrowly tailored rule. *Id.*, slip op. at 2, 10.

Instead of striking a balance between employee rights and employer rights as required by the Court, the Board in *Stericycle* opted to find the former presumptively outweighs the latter except in very narrow situations. Regardless of the magnitude of the business interest, legal duty, or even the need to protect employees undergirding a rule, any potential interference with Section 7 rights will render that rule presumptively unlawful. This is not a standard that fairly balances

competing legitimate interests; it is a standard that values the most attenuated Section 7 interest over the strongest of business or societal concerns. Congress never intended the Act to prevent employers from upholding safe and harassment-free workplaces or penalize companies for doing so. *See Republic Aviation*, 324 U.S. at 797 ("The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time."). By stretching the scope of Section 7 beyond its intended boundaries—and common sense—the *Stericycle* framework undermines employers' ability to establish essential policies that foster productivity, protect employees' safety, and maintain a respectful work environment.

Indeed, even the mere possibility of being able to rebut the presumption of illegality under *Stericycle* is largely illusory. As Member Kaplan pointed out in his dissent in *West Shore Home, LLC*, 372 NLRB No. 143, slip op. at 2 (2023), "no matter how narrowly tailored the rule, there could always be a rule that is ever so slightly more narrowly tailored."[6] Such a demand for linguistic perfection also fails to recognize the practicalities of designing the myriad rules, policies, and handbooks needed to run a business. The experience of the Board has been that it is largely impossible to craft reasonable rules and policies addressing a range of issues without having some ambiguity and overlap with one or more types of possible NLRA-protected conduct. *Boeing*, 365 NLRB at 1502, 1513 n.92.

Stericycle's failure to genuinely balance employer interests and the exercise of Section 7 rights undermines employers' statutory and legal duties under federal and state laws to maintain

[6] Even in *Lutheran Heritage Village-Livonia*, the Board observed that work rules are necessarily general in nature and thus employers should not be required "to anticipate and catalogue in their work rules every instance in which [prohibited conduct] might conceivably be protected by (or exempted from the protection of) Section 7." 343 NLRB 646, 648 (2004). Regrettably, the Board in later cases under the *Lutheran Heritage* standard lost its bearing and began requiring something close to linguistic perfection. *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 1 (2019).

safe environments, investigate allegations of harassment, uphold respectful workplace standards, and safeguard confidential and proprietary information. *See Stericycle*, 372 NLRB No. 113, slip op. at 32 (Member Kaplan, dissenting). The *Stericycle* framework thereby creates a dilemma by forcing employers to either comply with various legal and regulatory requirements or risk having every workplace policy challenged as potentially violative of the Act, leaving employers unable to enforce essential workplace rules without facing legal uncertainty and litigation. The *Stericycle* framework has also made it increasingly difficult for employers to draft workplace policies with certainty, as nearly any rule may now be subject to challenge. This climate of regulatory uncertainty makes employers hesitant to uphold essential workplace standards for fear of having to litigate whether those standards could withstand scrutiny under the broadest possible interpretation of Section 7. Such uncertainty discourages investment while encouraging litigation and falls particularly hard on small businesses that may lack the resources to secure experienced labor counsel. *See* Anna Musquera & Scott Brennen, *Regulatory Uncertainty Is What Actually Holds Back Innovation*, Brookings (Apr. 20, 2026), https://www.brookings.edu/articles/regulatory-uncertainty-is-what-actually-holds-back-innovation ("[O]ne of the clearest and most consistent findings is that regulatory uncertainty discourages investment and innovation, especially among smaller firms.").

Compounding *Stericycle*'s failure to balance employee and employer rights, the decision also adopts an excessively broad interpretation of potential interference with Section 7 rights. As Member Kaplan noted in his dissent, *Stericycle*'s version of the "reasonable employee" is an individual who is "predisposed to read into their employer's work-rules references to Section 7 activity where none exists, and who would not engage in protected concerted activity without first minutely examining each such rule set forth in their employee handbook." 372 NLRB No. 113,

slip op. at 17. Moreover, *Stericycle's* version of the reasonable employee reads workplace rules in a vacuum. Thus, regardless of the context or evident purpose of a rule, or even basic common sense, the *Stericycle* standard presumes a rule unlawful anytime "an individual could possibly suspect that any isolated word or phrase in a rule that does not prohibit Section 7 activity might be interpreted to do so." *Id.*

1. The Board should overturn *Stericycle* in favor of a new standard based on *Boeing*.

Accordingly, the Board should overturn *Stericycle* and return to the objectively reasonable-employee and balancing elements of the *Boeing* test for determining when the mere maintenance of a facially neutral rule is unlawful.[7] As a threshold matter, the General Counsel must first prove that a facially neutral rule would in context be interpreted by an objectively reasonable employee to potentially interfere with the exercise of a Section 7 right. *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2. This standard is an objective one and looks solely at the wording of the rule or policy at issue. *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 6 n.14 (2019). Rules must be read from the perspective of "an objectively reasonable employee who is aware of his legal rights, but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA." *LA Specialty*, 368 NLRB No. 93, slip op. at 2 (citation modified). Only if the General Counsel meets this burden should the Board determine whether the nature and extent of the rule's potential reasonable effect on the exercise of NLRA rights outweighs the legitimate justifications associated with the rule. *See Boeing*, 365 NLRB at 1496. In conducting this evaluation, the Board

[7] This new standard should also apply to the interpretation of arbitration agreements, *see Briad Wenco, LLC d/b/a Wendy's Restaurant,* 368 NLRB No. 72 (2019), and to rules and oral directives relating to keeping investigations confidential. *See Apogee Retail*, 368 NLRB No. 26 (2020).

should balance the employer's legitimate business justifications, along with societal interests or regulatory requirements underpinning the rule, against the extent to which the rule or policy, viewed from the perspective of reasonable employees, interferes with employee rights under the Act. *See id.*

i. Rules must be read in context from the perspective of an objectively reasonable employee.

Importantly, a challenged rule should not be found unlawful merely because it could hypothetically be interpreted to potentially limit Section 7 activity or because the employer failed to eliminate all ambiguities from the rule. *See LA Specialty*, 368 NLRB No. 93, slip op. at 2 (citing *Boeing*, 365 NLRB at 1502). A requirement for perfection in rules drafting creates unnecessary conflict between the rights of employees and those of employers just by the shear breadth of rules that would be implicated. Linguistic precision is neither legally necessary nor realistic for every rule. *Id.* Simply because a rule or policy *could* reasonably be read to interfere with Section 7 rights does not mean an objectively reasonable employee *would* so interpret it. *Newmark Grubb Knight Frank*, 369 NLRB No. 121, slip op. at 2 (2020). How an objective, reasonable employee would interpret a rule or policy is largely dictated by the context of the rule. To analyze the context of a rule the Board "must refrain from reading particular phrases in isolation." *LA Specialty*, 368 NLRB No. 93, slip op. at 5 (quoting *Lutheran Heritage*, 343 NLRB at 646). Instead, the Board must look to the context of a rule or policy in order to understand how an objectively reasonable employee would read it. This context can come from the explicit or implicit purpose of a rule as it appears to an employee, from surrounding or similar sections, from examples given in the rule, from the rest of the rule at issue, from the industry or work setting, or from savings clauses.

One of the simplest ways a rule can make clear it does not reach Section 7 conduct is when the legitimate purpose of the rule is reasonably understandable upon reading, either because it is clearly stated or because the purpose can be readily inferred. For instance, in *Interstate Management Co. LLC,* 369 NLRB No. 84, slip op. at 4 (2020), the Board applying *Boeing* found that a rule listing employee names and contact information as types of confidential information would be understood as applying to the protection of the employer's private records, since both the preamble and concluding paragraph of the rule made clear its purpose was to safeguard the employer's information and information systems. An objectively reasonable employee would thus not read the rule as applying to their own use of names or contact information for Section 7 purposes. *Id.* In *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 3 (2021), the Board also applying *Boeing* held that because a policy against using the employer's name on social media clearly explained its purpose as attempting to control who spoke for the company, objectively reasonable employees would read the rule as applying to that purpose only, and not applying to employee use of the employer's name as part of Section 7 activity.

Broad statements can also be clarified by specific language or examples given elsewhere in the rule. For example, in *Motor City Pawn Brokers Inc.,* 369 NLRB No. 132, slip op. at 5 (2020), the Board applying *Boeing* held that an objectively reasonable employee would not read a rule's reference to "proprietary information . . . of employees" without taking into account the specific examples of confidential information listed in the document, none of which implicated Section 7. Likewise, in *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 2, the Board held that a broad rule against "inappropriate communications" was objectively reasonable because it fell in an introductory paragraph that was followed by multiple lawful guidelines, and employees would not read the introduction in isolation. Also in *Medic Ambulance*, slip op. at 2–3, the Board held

that a rule against disclosing "confidential or proprietary information regarding the company or your coworkers" would not be read by an objectively reasonable employee as applying to wages or terms and conditions of employment because the rule also gave examples of the types of information to which it referred, such as trade secrets and copyrights, none of which implicated wages or Section 7 matters.

Additionally, objectively reasonable employees would read a rule as a whole, not parse out a single clause or section and read it out of context with the broader rule, or purpose. *LA Specialty*, 368 NLRB No. 93, slip op. at 5. If an interpretation of a sentence would render other sentences in that rule superfluous or meaningless, that interpretation is not reasonable. *See id.* For example, in *Medic Ambulance*, 370 NLRB No. 65, slip op. at 4, a rule that only certain named human resources workers could give out information regarding "current or former employee compensation" was immediately preceded by a sentence regarding how to handle "[a]ll telephone calls regarding a current or former employee's position." The Board held that an objectively reasonable employee would put the two sentences together and understand that the policy refers to when someone calls the company to ask about particular employees, and not to the discussion of wages more generally.

Relevant context would also include the employer's industry or work setting because objectively reasonable employees would be familiar with heightened security, confidentiality, safety, or other concerns prevalent in a particular industry. See *Boeing*, 365 NLRB at 1508. For example, in *Argos USA LLC*, 369 NLRB No. 26, slip op. at 4 (2020), the Board applying *Boeing* found that concrete truck drivers, applying the "everydayness of their job" to understanding the purpose of a cell-phone ban, would reasonably recognize the dangers associated with talking or texting while driving a 70,000-pound truck, and would not read the rule as a ban on discussing, taking photos, or recording their terms and conditions of employment while away from the facility.

Notably, this rule would also generally align with state regulations on the use of a cell phone while operating a vehicle and comply with federal DOT regulations.[8]

Finally, savings clauses included in rules or policies are extremely important in determining, and clarifying, whether a given rule interferes with Section 7 rights. Where a facially neutral rule clearly applies to protected conduct, a savings clause that is sufficiently prominent and specific can still save the rule. The savings clause need not explain "the broad panoply of rights" that employees enjoy under the Act to be effective, as the point of a savings clause is not to remove all ambiguity from a rule, but rather to simply clarify that regardless of what the rule says, it does not apply to the affected Section 7 activity. *See Maine Coast Memorial Hospital*, 369 NLRB No. 51, slip op. at 3 n.8 (2020) (quoting *First Transit, Inc.*, 360 NLRB 619 (2014)).

Where a facially neutral rule clearly forbids protected conduct, the savings clause must be sufficiently specific to be effective. This is where clear, plain language is important. Vague savings clauses, or those full of legalese, that would require employees to "meticulously determine the state of the law" themselves are likely insufficient to prevent the rule's interference with the exercise of NLRA rights. *Everglades College, Inc.*, 368 NLRB No. 123, slip op. at 3 (2019) (finding exception to arbitration agreement "where specifically prohibited by law" insufficient to save otherwise clear ban on filing claims with Board); *accord Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 3–4 (2019); *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 as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.").

[8] *See* Limiting the Use of Electronic Devices, 49 C.F.R. §§ 392.80–.82 (2026).

Savings clauses also must be "sufficiently prominent" to save a rule that otherwise clearly applies to protected conduct. *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72, slip op. at 2 (2019). The prominence of a savings clause is judged by several factors, and does not necessarily require bolding, underlining, or other exceptional measures. For example, the prominence of a savings clause is increased if it is incorporated or referenced in the rule it saves,[9] immediately follows the rule it saves,[10] is in a relatively short document,[11] appears in its own paragraph,[12] or appears at the end of the document, right before the signature line.[13]

And while a less prominent or less specific savings clause may not be sufficient, alone, it should be considered along with other contextual information when determining how an objectively reasonable employee would read the rule. *See Shamrock Foods Co.*, 369 NLRB No. 140, slip op. at 1, 6–7 (2020) (holding that while savings clause was insufficiently prominent by itself to find a rule lawful, it was still a relevant consideration in interpreting the rule).

In sum, the Board should revert to the reasonable-employee standard articulated in *Boeing* and *LA Specialty* and apply a common-sense, contextual analysis that takes into consideration the purpose of a rule as it would be understood by an employee in that industry or work setting reading it, looks at surrounding or similar sections, includes examples given in the rule, does not read the

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[9] *See id.* (clause referenced in same paragraph).
[10] *See Anderson Enterprises, Inc.*, *d/b/a Royal Motor Sales*, 369 NLRB No. 70, slip op. at 3 (2020).

[11] *See San Rafael Healthcare & Wellness, LLC,* 369 NLRB No. 105, slip op. at 3 (2020) (document only three pages); *Four Seasons Healthcare & Wellness Center, LP, A California Limited Partnership*, 370 NLRB No. 8, slip op. at 3 (2020) (two-page and three-page documents).

[12] *See id.*

[13] *See id*.

rule in isolation, and takes into account any savings clauses. The ultimate question is not whether a trained labor lawyer reads the rule as limiting or prohibiting Section 7 activity, it is whether the reasonable employee reads it in that way.

ii. The Board must strike a careful balance to safeguard both employer and employee rights and interests.

Where a rule, as read by an objectively reasonable employee, interferes with Section 7 rights, the Board should strike a careful balance between that right and the rights and duties of the employer. Unlike the standard articulated in *Stericycle*, a balance that properly weighs the rights and needs of employers will necessarily entail the possibility that in a particular case, a challenged rule may be lawful to maintain even though it limits the exercise of Section 7 rights to some extent because the legitimate employer interests it advances outweigh that limitation. *Stericycle*, 372 NLRB No. 113, slip op. at 17 (Member Kaplan, dissenting). The Board frequently balances legitimate employer needs against Section 7 rights in other situations. *See Our Way, Inc.*, 268 NLRB 394, 394–95 (1983) (balancing the rights of employees, employers, and unions to find ban on soliciting during working time lawful); *GTE Lenkurt, Inc.*, 204 NLRB 921, 921–22 (1973) (holding lawful no-access rule after balancing employer and employee rights). Similarly, when analyzing a rule, the Board must balance the employer's legitimate business justification for the rule against the rule's potential chilling effect on the exercise of Section 7 rights at issue.

Indeed, as discussed above, the Supreme Court has recognized on multiple occasions that employers have a legitimate right to discipline employees and control their businesses. *See Republic Aviation*, 324 U.S. at 797–98; *Great Dane Trailers*, 388 U.S. at 33–34; *Erie Resistor*, 373 U.S. at 229. Societal interests should also play a role, as they did in *Flagstaff Medical Center*, where the Board applying *Lutheran Heritage* upheld a no-photography rule at a hospital in part because the rule implicated "weighty" patient confidentiality interests. *See* 357 NLRB 611, 659,

663 (2011), *petition for review granted in part and denied in part*, 715 F.3d 928 (D.C. Cir. 2013). Those societal interests are also served by rules or policies that seek to comply with an employer's legal or regulatory duties. It is well established that the Board may not "wholly ignore other and equally important Congressional objectives," as the "entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). This should be especially true when the legal or regulatory scheme the rule seeks to enforce is for the benefit of the employees themselves. *See Apogee*, 368 NLRB No. 26, slip op. at 6 (applying *Boeing*, balancing Section 7 with EEOC policies against harassment).

iii. However, the Board should dispense with *Boeing*'s categories.

Although the Board should re-adopt the balancing and reasonable-employee standards articulated in *Boeing* and its progeny, the attempt to categorize rules should be abandoned. While *Boeing*'s classification of rules into three or four categories[14] was a laudable effort to bring predictability and clarity to an area of law rife with the disorder and inconsistency prevalent under the *Lutheran Heritage* standard, the *Boeing* categories ultimately caused their own confusion among the labor-management bar. Moreover, while some rules lend themselves to broad categorization—like rules banning discussion of wages—other rules do not. For instance, the Board has variously categorized rules making salary information confidential as Category 1 or

[14] While the Board initially adopted three categories—(1) rules that are always lawful, (2) rules warranting individual scrutiny, and (3) rules that are always unlawful—in *LA Specialty* the Board further divided Category 1 into Category 1(a) rules that are always lawful because they have no impact on Section 7 rights, and Category 1(b) rules that are always lawful despite having an impact on Section 7 because compelling employer interests will always outweigh the implicated Section 7 rights. *Boeing*, 365 NLRB at 1496–97; *LA Specialty*, 368 NLRB No. 93, slip op. at 2 n.2; *cf. Boeing*, 365 NLRB at 1508 n.77 (Member Kaplan, in concurrence, stating he would have preferred a four-part framework).

Category 3, depending on the specific context of the rule at issue. *Contrast Medic Ambulance*, 370 NLRB No. 65, slip op. at 4 (finding rule banning sharing compensation information lawful), *and Shamrock Foods Co.,* 369 NLRB No. 140, slip op. at 5 (holding lawful rule making compensation schedules confidential), *with Lowe's Home Center*, *LLC*, 368 NLRB No. 133, slip op. at 1 n.1 (2019) (finding unlawful rule listing "salary information"), *enforced*, 850 F. App'x 886 (5th Cir. 2021). As these cases illustrate, because the *Boeing* standard rightly puts such emphasis on the specific context of a given rule in determining whether it interferes with Section 7 rights, any attempt to categorize many types of rules will either require ignoring the specific context of that rule or result in extremely narrow categories that include a rule's specific context and are thus not generally useful. Thus, the Board should dispense with categories and analyze rules on their own merits.

2. Under the proposed new standard, both rules in this case are lawful

Applying the proposed modified *Boeing* standard to the rules here, they both are lawful to maintain. Neither rule explicitly bans Section 7 conduct, so both are facially neutral. And, while both rules were unlawfully applied to protected concerted activity, that does not render the rules unlawful themselves. *See AT&T Mobility, LLC*, 370 NLRB No. 121 (2021). Also, as further explained below, in both cases the Employer's rights and legal obligations served by the rule in question outweigh its impact on NLRA rights.

a. The rule against photography is lawful.

As noted above, the Employer maintains a five-page "Management Instruction" (MI) on the use of cell-phone cameras that bans their use by employees in "restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, or any other areas" absent management

approval. The MI also includes a savings clause that excepts from the rule "[p]hotography conducted in accordance with the collective bargaining agreement."

Under the first step of the proposed *Boeing*-based standard, the rule must be analyzed to determine whether an objectively reasonable employee would read such a rule as applying to Section 7 activity. As the Board noted in *Boeing* itself, rules banning photography on company premises would be reasonably read as banning certain protected concerted uses of photography, such as documenting collective action or terms and conditions of employment. 365 NLRB at 1510, 1512; *BMW Mfg. Co.*, 370 NLRB No. 56, slip op. at 3–4 (2020). The only contextual element here that would potentially mitigate that reading is the savings clause. The savings clause here is relatively prominent, occurring as its own bullet point two pages from the rule at issue, in a short five-page document. *See San Rafael*, 369 NLRB No. 105, slip op. at 3; *Four Seasons Healthcare*, 370 NLRB No. 8, slip op. at 3. However, because the savings clause only addresses activity covered by the collective-bargaining agreement, and not all protected concerted activity, the savings clause does not reach all the Section 7 activity potentially affected by the rule and thus is insufficient to clarify that the rule does not apply to Section 7 activity.

The next step is to balance the competing interests at play. The U.S. Postal Service, much like the defense contractor in *Boeing*, has significant privacy and confidentiality interests it must protect from accidental or intentional disclosure by employees' cameras. *See Boeing*, 365 NLRB at 1511. The MI was an attempt by Respondent to comply with its legal obligations to not disclose customers' or employees' personally identifiable information, including names and addresses. Respondent also asserted that, much like the employer in *Boeing*, the ban on cameras was necessary to promote the physical security of post offices and the valuable assets contained therein. *Id.* In comparison, the rule's effect on Section 7 is, like in *Boeing*, "comparatively slight." *Id.* at

1510, 1512. The vast majority of images or videos blocked by the policy do not implicate any NLRA rights. *Id.* at 1512. Moreover, the requirement that activity be concerted under Section 7 further reduces how often the usually solitary activity of photography will be protected. *Id.* The range of Section 7 activity affected is reduced even more by the savings clause, which exempts all such activity done pursuant to the CBA. Accordingly, as in *Boeing,* due to the vital employer interests behind the rule, and the relatively peripheral Section 7 rights affected, the MI here is lawful. *Id.* at 1494, 1512 (finding similar photography ban lawful).

The fact that the list of banned areas in the MI ends with "or any other areas" does not alter this conclusion. First, while "any other areas" could potentially be read as including non-work areas like break rooms or parking lots, all the other examples in the list are of sensitive work or private areas like bathrooms. In this context, it is unclear whether an objectively reasonable employee would read the term "any" literally or as only referring to areas similar to those listed. *See Shamrock*, 369 NLRB No. 140, slip op. at 6 n.10; *see also DeKalb County, et al. v. Federal Housing Finance Agency, et al.*, 741 F.3d 795, 799 (7th Cir. 2013) (recognizing there are often implicit exceptions to "all"). Regardless, the Board in *Boeing* found in a case with similar rights and interests at stake that a ban on photography over the entire property was lawful. 365 NLRB at 1494. Thus, even if an objectively reasonable employee would read "any other areas" as applying to non-work areas, the balance still weighs in favor of finding the MI lawful.

b. The rule against unfavorable or prejudicial conduct is lawful.

The mere maintenance of Respondent's rule against unfavorable or prejudicial conduct is similarly lawful. The ELM contains the following provision:

> 665.16 Behavior and Personal Habits – Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal

> Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary action . . . .

Under the first step of the proposed *Boeing*-based analysis, the Board must determine whether the requirements to conduct oneself off duty "in a manner that reflects favorably upon" Respondent or refrain from "conduct prejudicial" to Respondent infringe on employees' Section 7 rights. As the Board found in other cases applying *Boeing* to disparagement rules, such rules can infringe on the important, long-recognized right of employees to seek support from third parties. *Motor City*, 369 NLRB No. 132, slip op at 5–6; *Medic Ambulance*, 370 NLRB No. 65, slip op. at 4–5. However, the context of this rule suggests that an objectively reasonable employee would not read it as a rule against disparagement but rather as an ethics rule. While the rule opens and closes with the broad phrases "reflects favorably" and "other conduct prejudicial to the Postal Service," none of the examples provided in the rule would reasonably be understood to apply to disparaging Respondent. The citation to the Federal Standards of Ethical Conduct, along with specific bans on criminal, dishonest, or immoral conduct, illustrate the purpose of the rule and inform the understanding of the broader opening and closing terms, which should not be read in a vacuum. As a mere ethics rule, the ELM here has no impact on Section 7 activity, and under the proposed standard the analysis ends.

Even if, however, the ELM would be reasonably understood to apply to disparagement of Respondent, the rule would still be lawful. That is because in applying *Boeing* to disparagement rules, the Board has previously found that employers have a substantial legitimate justification in

requiring the loyalty of their employees. *See Motor City*, 369 NLRB No. 132, slip op. at 6–7 (citing *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953)); *Medic Ambulance*, 370 NLRB No. 65, slip op. at 5. In fact, the Board, applying *Boeing*, has repeatedly held that the employer interests involved in disparagement rules using similar language as the one here outweigh those rules' comparatively slight adverse impact on protected rights. *Id. See also BMW*, 370 NLRB No. 56, slip op. at 3 (finding lawful rule prohibiting behavior that "reflects negatively" on the employer); *David Saxe Productions, LLC*, 370 NLRB No. 103, slip op. at 3 (2021) (holding lawful rule against "detrimental" blog posts). Respondent's interest in employee loyalty is no less substantial, and the ELM's impact on Section 7 rights is no more significant than in those cases. Accordingly, even if the ELM here were weighed against any affected Section 7 rights, the rule would still be lawful.

In sum, when determining whether the mere maintenance of a facially neutral rule is unlawful, the Board should overturn *Stericycle* and return to the common-sense standards articulated in *Boeing* and its progeny. However, in keeping with the contextually specific analysis of the *Boeing* standard, the Board should abandon the attempt to create broad categories of rules as always lawful or unlawful.

IV. CONCLUSION

Contrary to Respondent's assertions, the Administrative Law Judge correctly concluded that Respondent violated Section 8(a)(1) of the Act by issuing a letter of removal to Kirkconnell, creating the impression that employees' protected concerted activity is under surveillance, unlawfully apply its rules to discipline Kirkconnell for engaging in protected concerted activity, telling employees that they are not allowed to post on social media related to work, directing employees to remove protected concerted social media posts, and threatening employees with

reprisals because they engaged in protected concerted activity. The ALJ also correctly concluded that Respondent violated Section 8(a)(1) of the Act by issuing a notice of removal to Williams because she engaged in protected activity and directing employees not to engage in the protected activity of taking a picture of their working condition. The ALJ also correctly concluded that ELM 665.16 and MI AS-882-2011-6 are unlawful under *Stericycle*, however, both rules are facially lawful under the new standard proposed by the General Counsel.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Supporting Brief in the matter of United States Postal Service, Cases 12-CA-316287 and 12-CA-330861, was electronically filed with the Executive Secretary of the National Labor Relations Board and served by electronic mail upon the below listed parties on this 31st day of August 2026, as follows:

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