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

CONCENTRIX CVG CUSTOMER MANAGEMENT GROUP, INC.

and **Case 12-CA-345633**

DANIEL JAMES HINTON, an Individual

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

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Pursuant to Section 102.42 of the National Labor Relations Board's Rules and Regulations, the undersigned submits this brief in support of the position of the General Counsel of the National Labor Relations Board (the Board) in the above-captioned proceeding.

Statement of the Case

Approximately 70 percent of Concentrix CVG Customer Management Group, Inc.'s, (Respondent) 19,000 U.S. based employees work remotely and their only practical means of communicating with each other is by using Respondent's communications systems. Charging Party Daniel Hinton (Hinton) was hired as a remote employee by Respondent on November 4, 2022. On or about June 18, 2024,[1] Respondent instructed Hinton not to discuss personal matters or unions in a chat group with his co-workers, told him that concerns related to unions could be raised with Respondent's human resources, removed him from the chat group, and issued a written warning to Hinton after he protested Respondent's unlawful instruction. Furthermore, Respondent maintains and enforces overly broad rules prohibiting employees from using its communications systems to engage in activities protected by Section 7 of the National Labor Relations Act where its system is the only reasonable means employees have to communicate with each other.[2] Respondent also maintains an unlawful solicitation policy and a rule prohibiting employees from discussing compensation. Additionally, Respondent maintains several rules that would be found

[1] All dates are 2024 unless otherwise indicated.

[2] As will be discussed in more detail, the Board in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143, slip op at 7 (2019), held that an employer violates the National Labor Relations Act where it prohibits employees from using its Information Technology (IT) systems where employees do not otherwise have an adequate avenue to communicate, such as face-to-face interactions.

unlawful under the test set forth by the Board in *Stericycle*, but which should be found lawful pursuant to the test that the General Counsel proposes be adopted by the Board.[3]

Thus, the record establishes that Respondent maintains and enforced facially unlawful work rules, prohibited employees from discussing unionization using the communication systems that remote employees depend upon for communicating with each other, directed employees to bring union-related concerns exclusively to Human Resources, and disciplined Hinton for engaging in protected concerted activity.

The questions to be decided in the instant matter include the following:

1. Did Respondent violate Section 8(a)(1) of the Act by maintaining and enforcing its Solicitation Policy, Proprietary Information and Inventions Agreement, and Home Agent Agreement, rules which unlawfully restrict employees' Section 7 rights?[4]

2. Did Respondent violate Section 8(a)(1) of the National Labor Relations Act (the Act) by instructing Daniel Hinton to keep discussion of unions and workplace issues out of the main chat on June 18, 2024?

3. Did Respondent violate Section 8(a)(1) of the Act by disciplining Daniel Hinton on June 18, 2024, for making posts in Respondent's Team chat raising concerns regarding Respondent's clock in policies and/or for discussing unionizing?

The General Counsel contends that the operative facts are not in dispute and that each of the above questions must be answered affirmatively. Accordingly, Counsel for the General Counsel urges that the Administrative Law Judge find that Respondent violated Section 8(a)(1) of the Act as discussed below and issue a recommended order that fully remedies those violations.

[3]As discussed in detail below, the General Counsel urges that the Board overrule its decision in *Stericycle*, and return to the balancing test set forth in *Boeing Co.*

[4] As will be explained in more detail below, these rules are unlawful under extant Board law, but the Company Authorization for Publication, Privacy and Use of My Personal Information, Social Networking, and Communicating with External Audiences rules should be lawful under the General Counsel's newly proposed test.

This brief will set forth the relevant facts of the case. Next, this brief will discuss the relevant case law and explain why Respondent's rules, statements, and discipline violated Section 8(a)(1) of the Act as alleged in the Complaint and Amendment to Complaint. The brief will conclude with a discussion of the appropriate remedy.

I. Procedural History

The alleged violations of the Act in this case are based on a charge filed by Daniel James Hinton, an individual, on June 28, 2024, and served on Respondent July 3, 2024. (GCX 1(a) and 1(c)).[5] The charge alleges in relevant part that Respondent unlawfully disciplined Daniel Hinton for engaging in protected concerted activity, maintained and enforced unlawful work rules, and unlawfully instructed Hinton not to engage in protected concerted activity or mention unions. (GCX 1(a)).

On May 19, 2026, the General Counsel's Complaint and Notice of Hearing issued, and an Amendment to Complaint issued on May 20, 2026. (GCX 1(d) and 1(f)). Respondent filed an Answer to the Complaint on June 3, 2026, and the First Amended Answer to Complaint on August 27, 2026. (GCX 1(h) and 1(m)). A hearing on this matter was held on August 27, 2026, before Administrative Law Judge Rosas.

II. Statement of Facts

a. Jurisdiction

Respondent is an Ohio corporation with its principal office and place of business in Cincinnati, Ohio; with employees working at various locations throughout the United States and internationally. (GCX 1(m)). At all material times, Respondent has provided strategy and design

[5] Citations to Counsel for the General Counsel's exhibits are (GCX exhibit number); citations to Joint Exhibits are (JX exhibit number), and citations to Respondent's exhibits are (RX exhibit number).

services, data and analytics services, technology services, and digital operations services to non-retail clients. *Id*. In conducting its operations, Respondent provided services valued in excess of $50,000 directly to customers located in states of the United States other than the State of Ohio, and Respondent is an employer engaged in commerce. (GCX 1(m)).

b. **Respondent continuously monitors the activities of its predominantly remote employee workforce**

Daniel James Hinton started working for Respondent on November 4, 2022, as a customer service representative, providing call center services to customers on behalf of various companies such as State Farm, Aeta, and Humana. (Tr. 13-14). Hinton was hired to work remotely, and he has never been to any of Respondent's offices. (Tr. 15). In fact, roughly 70 percent of Respondent's 19,000 employees U.S. based employees, or about 13,300 employees work remotely. (Tr. 142-143). Respondent's witnesses Chassandra Jackson, Jasmine Purvis, Christopher Smith, and Integra Williams, all worked remotely in some capacity. (Tr. 72, 97-98, 112, 122). Additionally, the remote employees are not in close proximity to each other. Respondent noted in its Brief in Support of the Respondent's Unopposed Motion for Remote Hearing, "the witnesses whom Respondent anticipates calling at the hearing are similarly dispersed across various locations, including Texas and Missouri." (GCX 1(i)). Jasmine Purvis testified that the only coworker she met in person lived 3 hours away from her. (Tr. 103).

Respondent continuously monitors its remote employees through software-based monitoring and webcam technology. (Tr. 17-18, 34-36). For example, during a meeting with supervisors, Hinton dropped from the meeting, but the meeting transcript reveals that supervisors could still see Hinton and they discussed what he was doing, with Espy informing Jackson "That's the beauty screen and see what he's doing. He's trying to come back in." (GCX 3). Respondent issued Hinton discipline on March 4, 2024, which confirms that not only are employees constantly

monitored, but also that employees are not permitted to use their cellphone at any time while working. Thus, the warning for "Misconduct/Professionalism" states, "On 03/02/24 Daiel Hinton was observed on a personal electronic device (cell phone) via the Secure CX camera in his workspace while his work computer was on and open which violates our Work From Home Agreement." (GCX 8). The Supervisor/Manager Comments further note, "At the beginning of your shift, you are able to have your cell phone at your workstation to get logged into your workstation however, once authenticated it should be placed in another area out of your workspace." (GCX 8).

As such, Respondent does not operate a typical workplace where employees see each other face-to-face at the office. Unlike a typical workplace, Respondent's workforce is predominantly remote, making employer-controlled communication systems the principal and only reasonable means by which employees communicate with one another.

c. **Respondent's Communication Systems are the only reasonable means for remote employees to communicate with each other**

Respondent maintains and enforces a rule, which is discussed at length below, that prohibits employees from using its IT/Communication systems to engage in activity protected by Section 7 of the Act. However, Respondent's remote employees cannot communicate with each other without using Respondent's IT/Communication systems. Respondent does not provide its employees with phone numbers, email addresses, or other contact information for their coworkers. (Tr. 19). Thus, the only way for employees to communicate with each other outside of work is to violate Respondent's policy and use Respondent's communications system to obtain each other's personal contact information. Although the record contains isolated examples of employees communicating with each other outside of work, the employees involved in those communications used Respondent's communication systems to obtain each other's personal contact information.

Jasmine Purvis testified that employees exchange their personal contact information using Respondent's chat function.[6] (Tr. 100-101). Christopher Smith testified that he received his coworker's personal contact information through the Teams chat. (Tr. 114, 119). Chassandra Jackson also confirmed that employees use Teams to share contact information. (Tr. 85). The mere fact that employees have occasionally managed to exchange personal contact information and communicate with each other outside of work does not make Respondent a typical workplace.

Respondent maintains a Workday website where employees can post their personal information for other employees to see. (Tr. 78). However, when Operations Manager Chassandra Jackson, who has worked for Respondent for over 20 years, was asked if her information was public on Workday, she testified, in relevant part, "Yes. Yes, it has. I've restarted (sic) receiving phone calls, and I did not realize why." (Tr. 71, 78-79). Accordingly, it appears that even Respondent's tenured supervisors have difficulty navigating the Workday system. Further, Jackson testified that Workday offers public, one-way communication, so someone could post "call me" but everyone would see the message, and the recipient cannot respond. (Tr.83, 85)

Hinton testified that Workday is not regularly utilized, as he was aware of it generally, but did not know that it could contain some employee contact information. (Tr. 36). Respondent only questioned Hinton and Jackson regarding Workday, and did not ask Jasmine Purvis (Purvis), Christopher Smith (Smith), Integra Williams (Williams), or Heather Camille Rosalez (Rosalez) about the system. Respondent also provided no information regarding the number of employees who have posted their contact information on Workday, whether that information is regularly

[6] The fact that some of Respondent's witnesses were permitted to use Respondent's communication systems to obtain some of their coworkers contact information without being subjected to discipline merely establishes that Respondent can pick and choose when it will enforce its rules and which conversations it will permit, and which it will prohibit. Accordingly, Respondent exhibits 2, 3, 4, 6, and 7 are irrelevant.

updated, or how often employees access Workday. The testimony regarding Workday shows that the system is not regularly used and is not a reasonable means of employee communication or sharing of contact information.

Senior Adviser Integra Williams testified that at an unknown time, on an unknown team (not asserted to be on Hinton's team) an unknown Team Lead used Respondent's email to disseminate the contact information for some of the individuals on that team. (Tr. 123). Williams estimates that there were approximately 20-30 people on the team, and estimates that 90 percent of the team shared some contact information. (Tr. 123). Respondent did not enter any documents into evidence substantiating Williams' testimony. Accordingly, at best, the evidence demonstrates that approximately 18-27 of the 13,300 employees (approximately 0.1-0.2% of remote employees) may have shared their contact information with their team some years ago. (Tr. 123). The fact that a miniscule number of employees may have shared contact information once upon a time does not establish that employees can effectively engage in activity protected by Section 7 of the Act without using Respondent's communications systems.

There is limited evidence that Respondent encouraged some employees to join work groups to continue learning work functions outside of work hours. For example, Hinton testified that approximately four years ago, he was encouraged to meet with his coworkers off the clock to form study groups to learn how to do their job more proficiently. (Tr. 43, 60). While this study group of 2-3 individuals created a Discord channel and met "after hours," these communications were for work purposes. (Tr. 43). Hinton had to use Respondent's Teams chat to share the Discord information with his coworker, Ashley, so that she could join the group and share the Discord channel with other coworkers. (Tr. 60-61). Hinton further testified that on the one or two occasions

that he shared his contact information with a coworker, he had to use Respondent's Teams to do so. (Tr. 61).

Respondent uses a QC Connect system and virtual machines to constantly monitor employees' computer screens. (Tr. 17-18). Respondent also uses webcams, such as Secure CX camera, to physically record employees while working, which are actively and continuously monitored either by a person or by software (like artificial intelligence). (Tr. 17-18, 34-36, GCX 8). Because Respondent's workforce is overwhelmingly remote, its communication systems function as the modern equivalent of the workplace floor and the watercooler. Respondent nevertheless maintains rules explicitly restricting employees from using its systems to discuss workplace concerns and unionization and constantly monitors employee communications, and promptly disciplined Hinton when he persisted in exercising his Section 7 right to engage in protected concerted activity.

d. **Respondent maintains overly broad rules that prohibit employees from engaging in protected concerted activity** [7]

As was admitted in Respondent's amended answer (GCX 1(m), since about January 3, 2024[8], Respondent has maintained a Solicitation Policy which contains the following language:

> III. The Policy
>
> Unauthorized solicitation on Company premises is not allowed... Solicitation includes selling or promoting products, goods or services on the premises and the use of employee lists for the purpose of solicitation.

[7] As discussed below, the General Counsel urges that the Board overturn its decision in *Stericycle* and reinstate the balancing framework set forth in *Boeing Co.,* 365 NLRB 1494 (2017). Respondent's Company Authorization for Publication, Privacy and Use of My Personal Information, Social Networking, and Communicating with External Audiences are facially lawful under that framework, as also discussed below.

[8] Respondent's People Solutions Director, Camille Rosalez, testified that this policy became effective February 1, 2019, and applies to all Respondent employees in North America. (Tr. 130).

> Solicitation during work time is not allowed. "Work time" includes all time when either the employee making the solicitation or the employee being solicited is engaged in the performance of his/her job duties or is required to be at his/her workstation waiting to perform his/her duties.
>
> The Company maintains various communication systems to communicate information to its employees. These systems include, but are not limited to, bulletin boards, electronic mail, voice mail, facsimile machine and personal computers. They are for business use only and may not be used for employee solicitation or distribution of literature. Only employees authorized by the Company may place materials on or remove materials from these systems. (GCX 5)

Respondent's People Solutions Director, Heather Camille Rosalez, testified that the purpose of this policy was to ensure, "That our employees are staying productive and to ensure that they are not soliciting employees during work time," and further noted that unauthorized solicitation means "Any type of solicitation." (Tr. 131-132). However, on cross examination, Rosalez conceded that Respondent does not have a total ban on solicitation. (Tr. 143-144). Rather, as admitted by Rosalez, pursuant to the provisions of the rule Respondent's People Solutions (Human Resources) exercises sole discretion to pick and choose which solicitations it will allow and which will be denied. Hinton also testified that employees often have excessive downtime, approximately 3-5 minutes, between receiving work calls, where they are just waiting for calls, but are not performing any work. (Tr. 18-19).

As admitted in Respondent's Amended Answer (GCX 1(m), since about January 3, 2024, Respondent has maintained Addendum A to its offer letters, which includes its Proprietary Information and Inventions Agreement that defines proprietary information as, "'Proprietary Information' includes, but is not limited to information about … terms of compensation and performance levels of Company employees …" (GCX 6). Rosalez asserted that this rule was in place, "to explain that this information is Company-wide aggregated information. That is not specific to any individual's pay benefits, any type of information that's individual to them. This is

specifically referencing Company proprietary information and Company confidential information." (Tr. 136). Further, the Information and Inventions Agreement contains the following excerpt of rule, "Company Authorization for Publication":

> Prior to submitting or disclosing for possible publication or dissemination outside the Company any material prepared by me that incorporates information that concerns the Company's business, I agree to deliver a copy of such material to an officer of the Company for his or her review. Within twenty (20) days following such submission, the Company agrees to notify me in writing whether the Company believes such material contains any Proprietary Information or Inventions, and I agree to make such deletions and revisions as are reasonably requested by the Company to protect its Proprietary Information and Inventions. I further agree to obtain the written consent of the Company prior to any review of such material by persons outside the Company. (GCX 6)

Rosalez testified that the Proprietary Information and Inventions Agreement (Addendum A) is in place to, "protect the Company's proprietary information and the Company's confidential information." and is applicable to all employees in North America. (Tr. 134-135). She further testified that Respondent maintained the Company Authorization for Publication rule because, "We want to ensure that if an employee has —— feels the need to publish or disseminate any type of information that is Company related, that they come to the Company and —— and provide what they're going to publish or disseminate and gain permission. We want to be sure that that is information that is not proprietary or confidential to the Company" (Tr. 137).

As was admitted in Respondent's amended answer (GCX 1(m), since about January 3, 2024, Respondent has maintained Addendum B to its work-at-home employees offer letters, which include the following rule regarding "Privacy and Use of My Personal Information":

> I acknowledge that on rare occasions when the Company communication lines are inoperable, Concentrix will communicate with me through my personal email, phone, and text messaging accounts, including but not limited to those occasions when my work equipment is not functioning properly. I acknowledge and accept all risks and responsibilities and costs resulting from such transmission or communication, including but not limited to risks pertaining to errors in transmission, misunderstandings or errors of identification which might occur, and

> I fully release Concentrix from any such responsibilities. I will treat all emails and text messages that I receive as Confidential Information and keep them in accordance with the Concentrix Corporate Code of Ethical Business Conduct, and the confidentiality provisions as set out in Section A of the HAA..... (GCX 6)

Rosalez testified that this rule was in place because "We wanted to ensure that our Company's information was protected." Rosalez further testified that, "You know, absolutely we should protect that information, but it's to clarify anything outside of that and if —— you know, we don't usually use their personal information, but our systems —— or their cell phone. But at times, if we need to, we just want to be sure that it's clear that that is still considered business information." (Tr. 138).

As was admitted in Respondent's amended answer (GCX 1(m), since about January 3, 2024, Respondent has maintained the following rules in its "Centrix Code of Ethical Business Conduct":

> **Using Technology Appropriately**
>
> Under no circumstances should you use our Company's computer and network systems to... send unauthorized solicitations... for yourself or for another organization.
>
> ….
>
> **Social Networking**
>
> The Company may require that an employee take down offensive or inappropriate material or posts, and employees are also requested to bring to our notice any such posts that they may come across on social media.
>
> ….
>
> Our Company respects your right to maintain your own blog(s) or post personal comments on social networking sites. However, our Company is committed to ensuring that the use of such communications serves the needs of our business by maintaining our Company's identity, integrity, and reputation in a manner consistent with our values and policies.
>
> ….

> In the case of any posts that could be connected with the Company (such as your picture with the company name or logo taken at a company event or sharing a news item or video clip of the Company), please ensure that you mention that the comments posted by you are your personal opinions and not that of the Company. In the event that the company finds such a post to be inappropriate, you may still be required to take it down.
>
> ….
>
> **Communicating with External Audiences**
>
> It is important that our Company provides fair, accurate, timely, and understandable disclosures to the public and to governmental authorities, both verbally and in writing. For this reason, only designated spokespeople are approved to respond or to communicate with outside parties — namely members of the media... If you receive a request from the media for information, for an interview, or to author a technical article or present a paper, you should forward the request to a member of our Marketing team, who will handle the request or provide support and guidance. (GCX 7)

Regarding the Using Technology Appropriately, Rosalez testified that Respondent maintains these rules to protect the equipment and network, and so "employees understand how to use the technology appropriately." (Tr. 140). She further asserted that the rule is in place so employees do, "not to post anything or use our systems for any type of policy violation or that they are using anything that could be construed as harassing, bullying, anything like that." (Tr. 140). Rosalez also stated that these rules were to keep employees productive and because, "we don't want anybody to feel pressured to donate money to join any organization or anything like that." (Tr. 140).

Regarding the Social Networking policy, Rosalez testified that it is because, "anything that is being posted on behalf of the Company needs to come from a Company representative or spokesperson." (Tr. 140-141). She further testified that, "We want to ensure that anything that comes from the Company is factual […] in line with our brand and to protect our […] business and our Company and […] our programs […] our clients […] and their customers." (Tr. 141).

Regarding the Communicating with External Audiences, Rosalez testified that this rule is to, "ensure that any information that is communicated with the media comes from –– comes from the Company […] From a – a Company spokesperson." (Tr.141-142). Rosalez further confirmed that the rule requires, for an employee, "if they feel like they're going to communicate with the media about the Company, they also must come to us and request permission." (Tr. 142). Rosalez concluded that the rule, "… ultimately it's to ensure that, you know, we maintain our brand, that everything's consistent, that there's no inappropriate or incorrect information that goes out about the Company." (Tr. 142). Hinton testified that he recognized the Solicitation Policy, Addendum A, Addendum B, and Concentrix Code of Ethical Business Conduct, and that he has been, and is still subject to these rules. (Tr. 15-17).

e. **Hinton engages in protected concerted activity and Respondent prohibits his discussions, and announces a rule requiring employees to discuss unions with Respondent's People Solutions department**

In June of 2024 Hinton had been having trouble clocking in. (Tr. 24). Historically, employees would turn on their computers 15 minutes before the shift, log into their windows account, and the system would automatically clock the employee in. (Tr. 24). However, Hinton's computer was delaying his clock-in 4-5 minutes each day. (Tr. 24). Hinton had notified his team lead and an operations manager of his clocking in issues in the past but received no response. (Tr. 24, 53-54). Hinton believed that as of June 18, he had lost between 30 and 45 minutes of pay as a result of not being clocked in on time. (Tr. 24).

Having received no response from Respondent regarding his clocking in issues, Hinton decided to raise his concerns with coworkers in the main chat. (Tr. 53-54). Thus, on June 18, when Hinton again had trouble clocking in, he posted in the Main Teams Chat at 12:33 pm and asked if it was a problem that the system was restarting, and his clock time was showing as 2

minutes before his shift. (GCX 2, Tr. 24-25). No one responded to Hinton's question, but about 20 minutes later at 12:51 pm, Hinton's coworker and fellow customer service representative Tahara English (English) posted in the group chat that, "This customer literally just called to talk about her love for animals." (GCX 2, Tr. 26). Hinton and English's coworker commented on English's comment, "Me too – I love animals – how fun," but still no one responded to Hinton. (GCX 2, Tr. 26). Approximately 30 minutes after his initial question, Hinton messaged the group chat, "ill (sic) ask that question tomorrow and see if anyone has the time," and English encouraged Hinton to ask his question. (GCX 2).

Hinton brought his concerns about pay and hours directly to his supervisor, Latoya Espy, by providing her with his confirmation code. (GCX 2). At that point, Hinton announced in the group chat that he was "gtb" which means "going to break." (GCX 2, Tr. 26). Another customer service representative in the group chat, Amylee McDowell, attempted to shed light on Hinton's issue, advising that employees clock in 5 minutes early so they are ready for calls when the shift starts, and Hinton replied that the system was not reflecting the correct time, that he thought it was a computer problem, and that he could not see the home screen until his start time. (GCX 2).

McDowell offered further assistance to Hinton by advising at 1:20 pm that, "if you wanna be 5 minutes exact id log in a min or 2 ahead so it would read at that time." (GCX 2). Hinton protested Respondent's policy, "its a policy thats in place to seeminly (sic) be there for the customers but also a way to penalize people for the poor technology and software we are giving; u cannot log in before 5 mi before; it wont let u." (GCX 2).

Hinton's supervisor, Espy, responded "You have 5 mins you can use to clock in before shift starts.. you are expected to be clocked in 01 and ready for calls at start of shift @Daiel Hinton" (GCX 2). Essentially, Espy instructed Hinton to clock in 5 minutes early so he would be ready at

the start of his shift. However, as Hinton testified, he was clocking in 5 minutes early, but the system was not showing the correct clock in time. (Tr 27). In response to Espy's message, Hinton asserted that Espy was ignoring his issues and stated, "it looks like everything i read is being ignored; i had no idea we had such a low ability to engage with problems; i dont know what to say besides read it again, please." (GCX 2). At that point, Espy tried to get Hinton to stop raising his concerns to his colleagues in the group chat, messaging at 1:22 pm, "@Daniel Hinton please keep personal concerns out of main chat. No one is ignoring you." (GCX 2). Hinton responded to Espy at 1:23 pm, asserting that his issues only get resolved when he raises them in the main chat, "if we dont talk in main chat, 2-5 people who don't know how to personabily (sic) express themselves come to convince me my issue is being heard; but nothing gets resolved." (GCX 2). Espy replied, "correct, not before 5 minutes of shift starting," but did not address Hinton's problems. (GCX 2). Hinton messaged the group that he was going to break at 1:24 pm. (GCX 2).

At 1:30 pm, Hinton messaged the group chat "its unfortunately (sic) it would be nice to get to know some of you." (GCX 2). Then at 1:32 pm Hinton messaged the group, "we would need to unionize to get to know eachother (sic) and change the policy. we should consider attempting to unionize." (GCX 2). Hinton did not suggest employees join or support a specific union or organization or ask anyone to sign authorization cards, but rather made a one-off comment that broadly the group of employees should consider unionizing. Espy immediately responded, chastising and directing Hinton, "Daniel please keep those things out of chat." (GCX 2). Hinton responded 1:38 pm, "its restricted under law to disrupt the open discussion of unionization efforts in the work place as long as it does not disrupt productivity. I sent the message during break. There is no way to discuss indiviidually (sic) with others due to the concentrix framework. Legally, I had

the right to say that. Broke no rules. And I would advice (sic) that we do not stop us from discussing unionization betwen (sic) calls."[9] (GCX 2).

Espy again attempted to silence Hinton by replying, "You can submit that kind of Idea to People Solutions [Human Resources], not chat," and then instructed Hinton to come off break, "Daniel clear Break code." (GCX 2). Hinton responded, "restricting our speech of unionization is against the law. I advice (sic) council (sic) for you before moving forward." (GCX 2). After Hinton made this comment at 1:40 pm, it appears that Respondent did something to the chat, because the format of the changed and the time of each chat message disappeared. (GCX 2). Hinton's supervisor removed him from the group chat, isolating him from his coworkers immediately after his union-related comments. (Tr. 28). Hinton testified that he remained out of the chat for approximately 5 minutes and that this had never happened to him before or since. (Tr. 28). Hinton believed he was being terminated. (Tr. 28).

After removing Hinton, Espy messaged Hinton that she needed to speak with him verbally, and instructed him to clock off. (GCX 2). Hinton was concerned, and replied, "please invite someone else in the chat. preventing discussions on unions is not allowed. removing me from the chat for a moment sends an illegal message." (GCX 2). Espy replied, confirming that she had removed Hinton from the chat, but asserted that it was unintentional. (GCX 2). Hinton believed he was being setup, and protested having the meeting. (GCX 2).

The top of page 5 of this group chat includes messages from Supervisor Latoya Espy to another individual named Alberta Howard-Huggins asking if she could put Daniel Hinton on "READ ONLY" to prevent "this" from continuing. (GCX 2, Tr. 25). Chassandra Jackson who was

[9] It is evident that Hinton was on break when he sent the messages because at 1:39 pm, Espy instructs Hinton, "Daniel clear Break code."

later present for Espy's conversation with Hinton, testified that she was not aware of Espy's conversation with Huggins, but confirmed that Huggins was one of the People Solutions HR Managers. (GCX 2, Tr. 94). Jackson did not talk with Huggins regarding Hinton's chat. (Tr. 95).

f. **Respondent disciplines Hinton for engaging in protected concerted activity**

Following his removal from the main chat group, Hinton was called into a meeting with Latoya Espy, Chassandra Jackson, and potentially team lead Kristin Henry.[10] (GCX 3, Tr. 28, 30, 87-88). Espy messaged Hinton that the meeting would be verbal, rather than by chat, and would be recorded. (GCX 2). Jackson testified that Hinton was called into the meeting because, "There was −− in our main chat, there was conversation, or should I say solicitation. Ms. Latoya asked for Mr. Hinton, could he please stop? It continued. Again, it was a lot of employees in this chat. Ms. Latoya asked once again. Daniel contin −− continued. So she wanted to pull him off the phones because I think there was a misunderstanding of what she was saying. So she wanted to make sure that they could have a verbal conversation." Of note, Jackson did not identify which comments made by Hinton were inappropriate solicitation until Respondent's counsel asked her whether she considered Hinton's statement "We would need to unionize to get to know each other and change the policy. We would consider attempting to unionize," to be solicitation. (Tr. 88-89). Jackson replied affirmatively. (Tr. 89). However, Respondent did not contemporaneously assert to Hinton in the group chat that his conduct was solicitation and in violation Respondent's solicitation policy. This defense only appeared after the unfair labor practice charge was filed.

[10] Hinton testified that he believed Henry was in the meeting, and is listed as Hinton's Supervisor on discipline Hinton was subsequently issued, but Henry does not speak during the meeting. (Tr. 30, GCX 4)

The transcription of this verbal meeting was admitted into evidence as General Counsel Exhibit 3.[11] The parties are generally identified in the exhibit, but Latoya Espy is identified as @1 instead of by her name. (Tr. 30). When Hinton entered the meeting, Espy asserted that she was not trying to silence him, but instructed Hinton, "But there is a forum and a platform where you discuss certain things, and I did indicate to you where you can discuss those things, but you continued to create chaos in the chat." (GCX 3). Hinton protested that Espy prohibited him from talking about unionization, and Espy told Hinton, "You can send those ideas to People Solutions, not the main chat, and then you started stating about law and legal right." (GCX 3). Accordingly, Espy reiterated that Hinton was prohibited from discussing unionization with coworkers and could only raise these topics to People Solutions, Respondent's HR team.

Espy confirmed to Hinton that she pulled him out of the group chat to limit the conversation in the group chat beginning at 0:3:10.857, "And then like I was stating on that is the reason why we're having a verbal conversation, because I don't wanna go back and forth with you in chat. But I know that Kristen had a meeting with you last week in regarding how we speak and being mindful of others in chat when speaking." (GCX 3). Espy went on to expressly link Hinton's discussion of unionization to the disciplinary meeting, stating, "And in this case, you're the only one that's speaking in chat about unionizing and other things. And we cannot have that in chat." (GCX 3). However, Espy then accused Hinton of "create[ing] chaos in the chat," and of being the only one bringing up unionizing and other things. (GCX 3).

Hinton again protested that Espy was not, "… allowed to discipline me for discussing the fact that I'm pro union in chat." Espy told Hinton they were holding him accountable because,

[11] The meeting appears to have been transcribed by Artificial Intelligence and has several misspellings and errors, but appears to reflect the communications that occurred during the meeting.

"you're going back and forth with management Daniel in regarding Legals," before confirming to Hinton, "You're being disciplined because you're not following direction when asked not to discard and certain things and chat, regardless if it was union or anything that's not team friendly." (GCX 3). Accordingly, Espy confirmed that she viewed discussions of unions and protesting work policies to be "not team friendly" and justification for the imposition of discipline. (GCX 3). However, Espy did not accuse Hinton of breaking Respondent's solicitation policy.

Hinton informed Espy that he understood that Respondent has a policy, but Respondent cannot discipline someone because they mentioned union activities. (GCX 3). Hinton told Jackson that he was not being disruptive, and Espy asserted, "you were being disruptive in chat because we're asking you not to speak about you because we're not a Union. You're not part of the Union of Concentrix and I'm not going to go into legalities with you, but I can tell you that if you were speaking in a Union setting, member of management couldn't be there." (GCX 3). Espy went on to state, "I wouldn't be allowed to be participating, and you're speaking in an open forum where supervisors are looking at your chat and you cannot do that."[12] (GCX 3). As such, Espy confirms that the only disruption was that Hinton refused to acquiesce to Espy's unlawful demand that Hinton not mention unionizing. Espy also appears to misquote the law, asserting to Hinton that management cannot be present when employees discuss unions in a union setting. (GCX 3). Hinton went on and told Espy that employees did not have a way to communicate with each other, stating, "we don't have any way to speak. I've brought it up because we didn't know we didn't know anybody." (GCX 3). Espy reiterated to Hinton, "And again, I and I directed you to people solutions, but I directed you to people solutions about any ideas you may have and we should have left the conversation at that. But we didn't. You continued and that's where the accountability is coming

[12] If this were the case, Respondent employees would never be permitted to discuss unions because Respondent is always monitoring its employees work chats.

from." (GCX 3). Again, Espy did not accuse Hinton of violating Respondent's solicitation policy, but rather advised that she is upset that Hinton continued to mention unionization and his clocking in issues. (GCX 3).

Hinton disconnected from the chat due to internet connectivity, and Espy brought Alisa Anderson-Blue into the meeting and discussed the situation with Alisa Anderson-Blue (from People Solutions) and supervisor Chassandra Jackson. (GCX 3). Beginning at 0:8:13.367, Espy stated, "So just to kind of sum it up, he's not wanting to take ownership and he feels that he's pro union and he's been basically picked on. And I explained to him Mam (sic) Pro Union is not the issue, it's the fact that you're putting this in a form in chat. And I ask you to speak to people solutions about any ideas you may have. But […] he continued to continued (sic)." (GCX 3). Espy goes on to misstate the law again, "But in Union, supervisors are not allowed to be in those conversations, and you're speaking in an open forum where supervisors are, but we are not a Union." (GCX 3). Espy confirmed yet again the reason for Hinton's discipline, "And I told that's the professionalism that's worth getting you in trouble is because you're not stopping when asked to be stopped. You're continuing on." (GCX 3). Espy also appeared to confirm that Respondent was watching what Hinton was doing in his house, stating, "I thought the disconnect from VPN but he just sitting there now he's not doing anything." (GCX 3).

Espy informed Anderson-Blue that she was posting (to the chat) a verbal warning Hinton was issued on March 4, for misconduct. (GCX 3). Of note, Hinton's discipline from March 4, is in evidence as General Counsel Exhibit 8. Espy asked if she can issue Hinton a written warning, and Anderson-Blue agreed that Espy could issue Hinton a written warning because they had already had a conversation. (GCX 3). When Hinton returned to the chat, he noted that it looked like he was being formally disciplined and asked if everyone agreed he was being disciplined for

discussing unionization. (GCX 3). Espy replied, "Again, Daniel you're being given a corrective action for professionalism and chat because we ask you to stop and you continued." (GCX 3). At 0:15:40.707, Espy then advised Hinton that he was being issued a written corrective action under misconduct, and if Hinton had any questions, he could talk to People Solutions. (GCX 3). In response, Hinton protested that he was removed from the Teams chat right after discussing unionization. (GCX 3). At 0:16:15:147, Hinton stated that, "… there are laws regularization (sic) and regulations covering this kind of kind of talk [when employees] don't have a way to discuss it with our coworkers." (GCX 3). Hinton further noted at 0:16:26:617 that requiring employees to contact Human Resources about unionization "… sounds like it's a shutdown intimidation tactic," and notes that disciplining him for "discussion unionization" may be unlawful. (GCX 3).

Alisa Anderson-Blue then equated Hinton mentioning unionization to yelling fire in a crowded theater, "So Daniels, freedom of speech is legal, but is also not legal to yell fire in a crowded theater. So there's platforms and proper uh platform that you can make these statements being at our business chat is not one of them." (GCX 3). Anderson-Blue does not suggest that Hinton's comments constitute solicitation in violation of Respondent's policy, but rather clearly convey the message that Hinton raising the idea of unionization will not be tolerated because, like yelling fire in a crowded theater, it could be dangerous and cause chaos. Anderson-Blue continued and advised Hinton at 0:17:12.267 that he can have his beliefs, but made it clear that he cannot voice his beliefs in the group chat. (GCX 3).

Anderson-Blue further explained that Hinton was being disciplined for failing to stop his conversation, stating, "And once we advise you, OK we cannot have theses type of conversations and chat. Once you're notified of that, then you must cease that conversation. Everyone is not. In favor of unions. And again, that's not a platform for that discussion. That is what they're trying to

get you to understand." (GCX 3). Anderson-Blue informs Hinton, "But again, we have to have them in our platforms and follow up because that's rules for everything." (GCX 3). Hinton said that he did not know what to do, and Anderson-Blue continued to equate Hinton's discussions of unionizing to unlawful conduct, noting that she cannot say Hi, Jack (hijack) on an airplane. At 0:18:28.127 Hinton accused Espy, "So you you intimidated everyone in our chat about the discussion of unions." Hinton reiterated to Espy, Jackson, and Anderson-Blue, that he discussed unionizing because the employees cannot talk with each other. (GCX 3). Hinton went on to protest Respondent's break and restroom policy before Espy stated they are not going to revisit these issues. (GCX 3). Anderson-Blue tried to get Hinton to agree with her by asking yes/no leading questions regarding whether Respondent had the right to create rules that employees needed to follow. (GCX 3). Hinton agreed that employers can make rules, but stated, "I don't agree with being punished for this and bringing in people solutions doesn't matter." (GCX 3). At 0:22:21.987, Anderson-Blue asked Hinton, "So where is the intimidation, Daniel? Cause I don't hear any." Hinton immediately responded "You cannot discipline someone for discussing unions. It doesn't matter even if you have told them to stop and you cant discipline them, you can remove me from the chat and tell me to stop. But you cannot formally discipline someone but discussing unionization." (GCX 3). Hinton complained more about the way he was being treated and then hung up. (GCX 3).

g. **Respondent does not discipline employees for discussing non-work matters in the group chat unrelate to unions**

It is uncontested that employees are permitted to have non-work related conversations in the group chat, during work hours and working time. For example, "The parties stipulate that employees are permitted to use work resources, including QuickConnect chat and Microsoft Teams chat, for nonwork−related conversations during work hours. It is common for employees

to use work resources on a daily basis to post about topics such as pets, animals, hobbies, and vacations, and they are not disciplined for using work resources to discuss such nonwork−related topics." (Tr. 9). In GCX 2, Tarah English and Sherri Furgason discuss pets and animals about 10 minutes after Furgason returned to work from break. (GCX 2). Hinton also testified that employees use the Microsoft Teams chat to discuss non-work related topics. (Tr. 23).

Chassandra Jackson testified that employees are permitted to have non-work related conversations in the chats, "But we do prohibit unprofessionalism, harassment, solicitation in our chats that are monitored by the managers." (Tr. 77). Jackson testified that sometimes employees try to solicit coworkers using Respondent's IT and electronic communication systems, but they address it by pulling the employee aside and telling them that solicitation is prohibited. (Tr. 77-78). Respondent provided no evidence that any employee other than Hinton was ever disciplined for solicitation, and Jackson did not testify that employees are ever disciplined for solicitation. (Tr. 77-78). Further, Respondent confirmed that, "There were no documents responsive to subpoena request 11 requesting discipline issued to employees for using technology systems to communicate about nonwork-related topics during the relevant period." (Tr. 8-9).

III. Argument

Section 7 of the Act establishes the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," and Section 8(a)(1), in turn, makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. §§ 157, 158(a)(1). "To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 152 (2014).

a. <u>Respondent's communication systems are the only reasonable means for employees to communicate with each other</u>

The Board "has long held that with regard to oral solicitation during nonworking time and the distribution of literature during nonworking time in nonworking areas, the Act does limit an employer's property right to control the use of its premises." *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143, slip op. at 1, (2019), citing *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944) (oral solicitation); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 620 (1962) (distribution of literature). In *Republic Aviation Corp.,* the Supreme Court "approved this 'adjustment between the undisputed right of self-organization assured to employees under the' Act and 'the equally undisputed right of employers to maintain discipline in their establishments.'" *Rio All-Suites*, 368 NLRB, slip op. at 1, quoting *Republic Aviation Corp., v. NLRB,* 324 U.S. 793, 797-798 (1945). The Board in *Rio All-Suites*, explained that, "… employees must have '*adequate* avenues of communication' in order to meaningfully exercise their Section 7 rights and that employer property rights must yield to employees' Section 7 rights when necessary to avoid creating an '*unreasonable* impediment to the exercise of the right to self-organization.'" *Rio All-Suites*, 368 NLRB, slip op. at 7, quoting *Republic Aviation Corp*, 324 U.S. at 802 fn. 8. The Board noted that typical workplaces with, "oral solicitation and face-to-face literature distribution provide more than 'adequate avenues of communication.'" *Rio All-Suites*, 368 NLRB, slip op. at 7. The Board explained employees "free time" on company property is the "very time and place uniquely appropriate" for oral solicitation, and distribution of literature in "nonworking areas on nonworking time is also an effective method of communication." *Rio All-Suites*, 368 NLRB, slip op 7-8 citing *Stoddard-Quirk* 138 NLRB at 620, and *Le Tourneau Co. of Georgia*, 54 NLRB 1253, at 1260-1261. The Board in *Rio All-Suites*, 368 NLRB, slip op. at 1, reiterated the general rule that employees do not have a statutory right to

use their employer's IT systems to engage in Section 7 activity, but created an exception to the general rule noting, "… we shall recognize an exception to the *Register Guard* rule in those rare cases where an employer's [IT] system furnishes the only reasonable means for employees to communicate with one another."

In the instant case, approximately 13,300 of Respondent's 19,000 U.S.-based employees, including Charging Party Hinton, work remotely. (Tr. 15, 142-143). In fact, Charging Party Hinton has never even been to Respondent's offices in person nor has he ever met any of his colleagues in person. (Tr. 15). Respondent's witnesses Chassandra Jackson, Jasmine Purvis, Christopher Smith, Integra Williams, were all remote employees in some capacity as well. (Tr. 72, 97-98, 112, 122). These remote employees work across the United States and are not especially close in proximity to each other, and Jasmine Purvis testified that the only coworker she met in person lived approximately 3 hours away. (GCX 1(i), Tr. 103).

The Board observed in *Rio All-Suites*, 368 NLRB, slip op. at 8, that in modern workplaces employees often have access to "… smartphones, personal email accounts, and social media," which can provide additional avenues for communicating Section 7 rights. But the Board explained that these additional communications can help supplement communications absolving the need for "… an employer's email system for nonwork purposes in the typical workplace." *Rio All-Suites,* 368 NLRB, slip op. at 8.

In a typical workplace an employee can simply ask their coworkers for their personal contact information, cellphone numbers, social media, or personal emails in face-to-face conversations, when coming to or leaving the facility, on breaks, or during lunch. However, remote employees working for Respondent must utilize Respondent's IT systems to ask for personal contact information. Respondent does not offer or host extracurricular activities or events for

employees to communicate. (Tr. 61-62). While there is some evidence that a very small number of employees used smartphones, personal email accounts, and social media to communicate with each other, Jasmine Purvis, Christopher Smith, and Chassandra Jackson all testified that they had to use Respondent's communication systems (e.g., the teams chat or email) to obtain their coworkers personal contact information. (Tr. 85, 100-101, 114, 119; RX 2, 3, 4, 6, 7). Hinton also confirmed that when he obtained his coworkers contact information, he had to use Respondent's Teams to do so. (Tr. 61). Further, Respondent prohibits employees from using their cellphones while working. (GCX 8). While there are examples of employees using Respondent's IT systems to obtain coworkers' contact information and having additional communications outside of work, the employees had to rely on Respondent's IT systems to initiate those discussions. Thus, it is apparent that Respondent's IT systems are the only reasonable means employees have to initiate, communicate about, and engage in Section 7 activity with their coworkers and a rule prohibiting all personal use unreasonably inhibits employees exercise of Section 7 rights.

Respondent also cannot establish that it is a typical workplace because some employees put some of their contact information on Respondent's Workday system. Jackson provided limited testimony that employees could choose to list some of their contact information on Workday. (Tr. 78-79). However, this does not provide a reasonable means for employees to communicate with each other. First, the communications posted to Workday are public, and one-sided (e.g., you can post, but the recipient cannot reply). (Tr. 83-85). Hinton testified that Workday is not used regularly, and that he is only generally aware of it. (Tr. 36). Respondent asked only Hinton and Jackson about Workday. Purvis, Smith, Williams, and Rosalez offered no testimony regarding how Respondent or employees use Workday, how often they use Workday, what percent of employees access Workday on a regular basis, etc. Thus, Respondent's Workday does not provide

employees with a reasonable alternative method for identifying and communicating with coworkers.

Respondent also does not operate a typical workplace because it continuously monitors its remote employees through its software and webcam technology. (Tr. 17-18, 34-36). Hinton's March 4, 2024, discipline confirms that Respondent actively monitors employees using the "Secure CX camera." (GCX 8). Supervisors actively monitored Hinton during a meeting, even when he disconnected from the meeting as demonstrated by Espy's comment to Jackson, "That's the beauty screen and see what he's doing. He's trying to come back in." (GCX 3). Accordingly, Respondent's employees have a unique and compelling need to be able to use Respondent's communication systems to contact their coworkers to engage in Section 7 activity during non-working time when they will not be monitored.

b. <u>Respondent unlawfully instructed employees not to discuss unions, and announced a rule that employees are only permitted to discuss unions with Respondent's People Solutions department</u>

As discussed above, Respondent's IT communication systems are the only reasonable means for Respondent's 13,300 remote employees to communicate with each other.

The Board in *Rio All-Suite* analyzed the *Republic Aviation* decision noting that, "… employees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization. A complete prohibition on solicitation and literature distribution in the workplace would necessarily choke off those 'avenues of communication' at 'the very time and place uniquely appropriate and almost solely available to them therefor.'" 368 NLRB No. 143,

slip op 6, (2019), citing *LeTourneau Co. of Georgia*, 54 NLRB at 1260, upheld in *Republic Aviation*, supra; and *Republic Aviation*, 324 U.S. at 801 fn. 6 (internal quotation omitted). The Board held in *Rio All-Suites* that, "Properly understood, then, *Republic Aviation* stands for the twin propositions that employees must have '*adequate* avenues of communication' in order to meaningfully exercise their Section 7 rights and that employer property rights must yield to employees' Section 7 rights when necessary to avoid creating an "*unreasonable* impediment to the exercise of the right to self-organization." 368 NLRB, slip op. 7, (2019), citing *Republic Aviation*, 324 U.S. at 802 fn. 8. Additionally, the Board in *Our Way, Inc.*, confirmed that, "… a rule is presumptively invalid if it prohibits solicitation on the employees' own time." 268 NLRB 394, 394 (1983), citing *Republic Aviation Corp.,* 324 U.S. 793. Accordingly, it is an unfair labor practice for an employer to create unreasonable impediments for employees engaging in Section 7 conduct, such as prohibiting employees from using Respondent's only reasonable means of communicating.

Respondent's remote employees are wholly reliant on Respondent's communication systems to interact with each other and they have no reasonable alternative means of communicating with each other. Despite this, on June 18, Espy, as discussed above in the Fact Section of this brief, repeatedly instructed Hinton, in front of approximately 150-180 coworkers who were also part of the chat, not to discuss unions using Respondent's communication systems (Teams chat). Espy also repeatedly told Hinton that he was only permitted to discuss the idea of unionizing with Respondent's People Solutions department. (GCX 2). Alisa Anderson-Blue reiterated and reinforced that prohibition just moments later during the remote meeting between Hinton, Anderson-Blue and Espy when she told Hinton that the Teams chat was not the platform for expressing his opinion about unions and equated discussion of unions in the Team chat to yelling fire in a crowded theater or hi jack on an airplane. (GCX 3). During that remote meeting,

Espy also announced a rule that employees are only permitted to discuss unions with Respondent's People Solutions.

Thus, the evidence establishes that Respondent violated Section 8(a)(1) of the Act by telling employees that they are never permitted to use Respondent's Team chat, regardless of whether they are on working or non-working time, to discuss unions because using Respondent's IT communications systems is the only reasonable method employees have for communicating with coworkers to engage in activity protected by Section 7 of the Act. *Rio All Suites,* 368 NLRB no. 143 (2019). Respondent further violated Section 8(a)(1) of the Act by telling employees that they were only permitted to discuss unions with Respondent's People Solutions as that rule 1) precludes employees from engaging in union and protected activities with their coworkers, and 2) chills employees in the exercise of their Section 7 rights because the rule requires that they report their protected activity to Respondent.

Even if employees had other reasonable means for communicating with each other to engage in Section 7 activity, Respondent's instruction not to use its Teams chat to discuss unions violated the Act. It is well established that an employer violates the act by permitting employees to discuss non-work related topics such as vacations and sports, while prohibiting similar conversation regarding union-related issues. *Orchids Paper Products Co.,* 367 NLRB No. 33, 15 (2018); *Sams Club*, 349 NLRB 1007 (2007); *Scripps Health d/b/a Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006).

Here Hinton's conduct in the Teams chat did not constitute solicitation under the National Labor Relations Act, but rather was simply a nonwork related conversation about unions. In *Amerinox Processing, Inc.,* 371 NLRB No. 105, slip op. at 17-18, (2022), the Board held that employers cannot prohibit discussion of unions during working time while permitting the

discussion of other non-work related topics, and that discussions regarding unionizing does not alone constitute solicitation. In *Wynn Las Vegas, LLC.*, the Board overruled the previous requirement that authorization cards be present to constitute solicitation, and held that an employee is engaged in solicitation when they attempt to, "to persuade the employee to vote a particular way in a union election." 369 NLRB No. 91, slip op. at 5-6, (2020). However, in the instant case, there is no union election pending, no organizing campaign, and no specific union was mentioned or considered. Rather, Hinton generally suggested that employees should consider unionizing. (GCX 2). Hinton does not advocate that employees vote for a particular union or in a particular way, and mentions in passing that his coworkers should think about organizing. Accordingly, Hinton mentioning unionization does is not solicitation under the Act, but is merely talk about unions, which is protected by the Act. See *Wynn Las Vegas, LLC.* 369 NLRB No. 91, (2020) and *Amerinox Processing, Inc.,* 371 NLRB No. 105, (2022). Accordingly, Hinton's actions do not constitute solicitation.

The Board in *Jensen Enterprises*, 339 NLRB 877, 878 (2003), affirmed that an employer violates the Act by prohibiting employees from discussing unionization, when it permits them to discuss other unrelated work subjects (such as vacations and cooking) "particularly when the prohibiting is announced or enforced only in response to specific union activity in an organizational campaign." *Jensen Enterprises*, citing *Willamette Industries*, 306 NLRB 1010, 1017 (1992) and *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986).

Here, it is uncontested that Respondent permits its employees to use its Teams chat and communication systems to discuss non-work related topics such as pets, animals, hobbies, and vacations, during working time, and they are not disciplined for doing so. (Tr. 8-9). Thus,

Respondent violated Section 8(a)(1) of the Act by prohibiting employees from using its Teams chat to discuss unions, while permitting employees to discuss other non-work related topics.

For the foregoing reasons, Counsel for the General Counsel respectfully requests that Respondent violated the Act by prohibiting employees from using its IT communication systems to discuss unions because employees have no other reasonable methods of communicating with each other. Even if it were to be determined that employees have other reasonable means of communicating with each other, Respondent still violated Section 8(a)(1) of the Act by forbidding employees from using its IT communications system to discuss unions because it permits employees to use those systems to discuss other non-work matters unrelated to unions. Finally, Respondent violated Section 8(a)(1) by requiring that employees direct discussions about unions to Respondent's People First.

c. <u>Respondent issued Hinton an unlawful written warning for engaging in protected concerted activity</u>

Section 7 of the Act establishes the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," and Section 8(a)(1), in turn, makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. §§ 157, 158(a)(1). "To be protected under Section 7 of the Act, employee conduct must be both 'concerted' and engaged in for the purpose of 'mutual aid or protection.'" *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 152 (2014).

To establish unlawful discrimination under Section 8(a)(1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S.

267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). If the General Counsel meets its burden, Respondent can rebut the *prima facie* case by showing that it would have taken the adverse action even in the absence of any protected activity. *Id.*

In the instant case, Hinton engaged in protected concerted activity by raising his work concerns about clocking-in with his coworkers in Respondent's group chat, and then suggesting to his coworkers, "we would need to unionize to get to know each other and change the policy. we would consider attempting to unionize." (GCX 2). Further, Respondent was aware of, and harbored animus toward, Hinton's union and protected concerted activity, as supervisor Espy responded, "Daniel please keep those thing out of chat." (GCX 2). The chat logs also demonstrate Respondent's animus, as Espy repeatedly instructed Hinton not to discuss unions in the group chat and instead demanded that he discuss unionizing only with Respondent's People Solutions (Human Resources). (GCX 2, 3). Further, Anderson-Blue demonstrated animus by equating Hinton's discussion of unions and working conditions to yelling fire in a crowded theater or saying hijack on a plane. Espy then asserted in that Hinton's comments caused chaos. (GCX 3).

Animus toward protected concerted activity can also be established through circumstantial evidence (such as the employer's timing in relation to the protected activity, offering pretextual reasons for taking the action and shifting its defenses). *Needham Excavating, Inc*., 371 NLRB No. 146, 27 (2022). In the instant case, Respondent issued Hinton a corrective warning to Hinton through its Connect CX homepage for "Misconduct/Professionalism," within an hour of him discussing unions. (Tr. 32, GCX 2, 3, 4). Further, Hinton was never told which specific policy he purportedly violated, and Respondent appeared to offer pretextual and shifting defenses for its

decision to discipline him, first asserting that Hinton was being disciplined for his lack of professionalism, before asserting for the first time at the hearing that Hinton violated its no-solicitation rule. (Tr. 67-68, GCX 2, 3, 4).

Counsel for the General Counsel has established a prima facie case of discrimination under *Wright Line*, and as such, the burden shifts to Respondent to rebut the *prima facie* case by showing that it would have taken the adverse action even in the absence of any protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Operations Manager Jackson conceded that employees sometimes use Respondent's IT communications system to solicit for various reasons, and she testified that when they do so, Respondent simply asks the employee to stop soliciting. Jackson offered no evidence that any employee other than Hinton has been disciplined for using Respondent's IT communication system to solicit other employees. (Tr. 77-78). Respondent also confirmed that "no documents responsive to subpoena request 11 requesting discipline issued to employees for using technology systems to communicate about nonwork-related topics during the relevant period." (Tr. 8-9). Thus, even if Respondent's no-solicitation rule were lawful and even if it disciplined Hinton for violating that rule, Respondent cannot show that it would have disciplined him even in the absence of his protected activity.

Respondent relying on pretextual reasons for Hinton's discipline also precludes it from establishing a *Wright Line* defense. When a respondent relies on pretextual reasons for taking action against an employee, it cannot, as a matter of law, meet its defensive burden under *Wright Line*. See *Austal USA, LLC*, 356 NLRB 363, 364 (2010). In the instant case, as explained above, Respondent that Hinton was being disciplined for "Misconduct/Professionalism" and did not assert

that Hinton was disciplined for violating the solicitation policy until its opening statement. (Tr. 67-68).

Thus, the evidence establishes that Respondent disciplined Hinton because he engaged in protected and union activity in violation of Section 8(a)(1) of the Act as alleged in the Complaint. Furthermore, Hinton's comments did not constitute solicitation, but even if they did, and even if Respondent disciplined him for engaging in solicitation, Respondent violated Section 8(a)(1) of the Act because it admitted that it permits employees to solicit after getting permission to do so from People First.

d. Respondent maintains and enforces rules which unlawfully restrict protected concerted activity

Respondent has maintained and enforced rules in its Solicitation Policy, Proprietary Information and Inventions Agreement, its Home Agent Agreement, and the Concentrix Code of Ethical Business Conduct (GCX 5, 6 and 7) that are unlawful under *Stericycle*, 372 NLRB No. 113, (2023).[13]

i. Respondent's Solicitation Policy, Proprietary Information, and Using Technology Appropriately rules are Unlawful under extant Board Law

> Respondent maintains the following policy prohibiting employees from engaging in solicitation:
>
> III. The Policy
>
> Unauthorized solicitation on Company premises is not allowed... Solicitation includes selling or promoting products, goods or services on the premises and the use of employee lists for the purpose of solicitation.
>
> Solicitation during work time is not allowed. "Work time" includes all time when either the employee making the solicitation or the employee being solicited is

[13] As will be discussed in greater detail below, Counsel for the General Counsel respectfully request that the Administrative Law Judge recommend that the Board overturn its decision in *Stericycle* and return to the standard articulated by the Board in *Boeing*, but without categories.

> engaged in the performance of his/her job duties or is required to be at his/her workstation waiting to perform his/her duties.
>
> "Work Area" includes places where employees perform their work duties, such as but not limited to, the production floor, training rooms, conference rooms, huddle rooms, offices, etc.
>
> The Company maintains various communication systems to communicate information to its employees. These systems include, but are not limited to, bulletin boards, electronic mail, voice mail, facsimile machine and personal computers. They are for business use only and may not be used for employee solicitation or distribution of literature. Only employees authorized by the Company may place materials on or remove materials from these systems. (GCX 5)

Respondent's policy is overly broad. First, the policy prohibits employees from ever engaging in solicitation on its premises, which, pursuant to rule would include remote employees' home work stations and offices, unless the employee obtains authorization from Respondent's People Solutions. (Tr. 143-145). Requiring employees to obtain approval prior to engaging in solicitation during their non-working time is unlawful. See *Brunswick Corp.*, 282 NLRB 794 (1987).

Further, an employer violates the Act if it prohibits employees from using its information technology and/or communications systems for engaging in activity protected by Section 7 of the Act if the employer's systems are the only adequate reasonable means available to employees for engaging in such activity. *Rio All-Suites*, 368 NLRB No. 143, (2019). As established above, Respondent's remote employees are reliant on Respondent's IT communication systems as their only reasonable means of communicating with their coworkers to engage in activity protected by Section 7 of the Act. Yet, Respondent's solicitation policy prohibits employees from using its IT communication systems to solicit or distribute literature to coworkers even during non-working time.

The solicitation policy is reinforced by Respondent's "Using Technology Appropriately" rule, which provides in part, that "Under no circumstances should you use our Company's

computer and network systems to... send unauthorized solicitations... for yourself or for another organization." (GCX 7). This rule, like Respondent's Solicitation policy, prohibits employees from using Respondent's technology (such as its chat systems and emails) to solicit coworkers.

Because Respondent's IT communication systems are the only reasonable means available for employees to communicate with each other and engage in activity protected by Section 7 of the Act, Respondent's rule prohibiting employees from using its computer and network systems to solicit for another organization (such as a union) is unlawful. *Rio All-Suites*, 368 NLRB No. 143, (2019).

Respondent maintains a Proprietary Information and Inventions Agreement that notes that "'Proprietary Information' includes, but is not limited to information about … terms of compensation and performance levels of Company employees …" (GCX 6). Rosalez asserted that this rule explains to employees that Respondent aggregates compensation and performance levels of Company employees at the Company-wide level not at the individual level and the company will keep that information confidential. (Tr. 136). Not only does this explanation make no sense (why would Respondent need to tell employees that they aggregate employee information on a company-wide level and will maintain that aggregated information as confidential), but is also simply not what the rule says. This rule sets forth employees' obligation to safeguard proprietary information, which includes a prohibition on discussing "terms of compensation and performance levels of Company employees," it does not describe Respondent's obligations to employees. (GCX 6). In *Alternative Entertainment Inc.*, 363 NLRB 1139, (2016), the Board upheld a finding that the employers rule prohibiting discussion of "compensation or employee salary information," was unlawful. Respondent's rule is patently unlawful on its face as it prohibits employee discussions

regarding compensation. See also *Hyundai America Shipping Agency Inc.*, 357 NLRB No. 80, slip op. at 21 (2011).

ii. Respondent's Company Authorization for Publication, Privacy and Use of My Personal Information, Social Networking, and Communicating with External Audiences rules are Unlawful under *Stericycle*

The language in the Company Authorization for Publication, Privacy and Use of My Personal Information, Social Networking, and Communicating with External Audiences, quoted in the Complaint and the facts section of the brief are unlawful under *Stericycle*, 372 NLRB No. 113, (2023). Under *Stericycle,* to establish that a rule is unlawful, the General Counsel prove that the challenged rule "has a reasonable tendency to interfere with, restrain, or coerce employees who contemplate engaging in protected activity." 372 NLRB No. 113, slip op. at 8 (2023). Specifically, if an employee could reasonably interpret a rule to restrict or prohibit Section 7 activity, then "the rule is presumptively unlawful." *Id*., slip op. at 9. That is so "even if the rule could also reasonably be interpreted not to restrict Section 7 rights" and "even if the employer did not intend for its rule to restrict Section 7 rights." *Id*., slip op. at 9-10. The framework is an objective standard, viewing challenged rules from the perspective of a reasonable employee who is economically dependent on their employer and may interpret work rules to prohibit Section 7 activity due to being "anxious to avoid discharge or discipline" and from the perspective of "a layperson rather than as a lawyer." *Stericycle,* slip op. at 9-10. Once the General Counsel establishes a presumption that the rule is unlawful, an employer may only rebut this presumption by demonstrating that (1) the rule advances a legitimate and substantial business interest *and* (2) the employer is unable to advance that interest with a more narrowly tailored rule. *Id.,* slip op at 10.

The "Company Authorization for Publication" rule in the Information and Inventions Agreement includes the following provision:

> Prior to submitting or disclosing for possible publication or dissemination outside the Company any material prepared by me that incorporates information that concerns the Company's business, I agree to deliver a copy of such material to an officer of the Company for his or her review. Within twenty (20) days following such submission, the Company agrees to notify me in writing whether the Company believes such material contains any Proprietary Information or Inventions, and I agree to make such deletions and revisions as are reasonably requested by the Company to protect its Proprietary Information and Inventions. I further agree to obtain the written consent of the Company prior to any review of such material by persons outside the Company. (GCX 6)

An employee reading this rule could reasonably believe that they must submit any information regarding Respondent to Respondent for review, prior to posting it, which could include information related to wages, hours, and other terms and conditions of employment. Additionally, employees would understand that Respondent could require them to delete or revise the posting even if that posting constituted protected concerted activity. (GCX 6). This rule is unlawful under *Stericycle*, and Respondent is unable to establish that its need for the rule outweighs the effects on employees' Section 7 rights.

Respondent maintains a "Privacy and Use of My Personal Information," in Addendum B to its Home Agent Agreement, which contains the following language:

> I acknowledge that on rare occasions when the Company communication lines are inoperable, Concentrix will communicate with me through my personal email, phone, and text messaging accounts, including but not limited to those occasions when my work equipment is not functioning properly. I acknowledge and accept all risks and responsibilities and costs resulting from such transmission or communication, including but not limited to risks pertaining to errors in transmission, misunderstandings or errors of identification which might occur, and I fully release Concentrix from any such responsibilities. I will treat all emails and text messages that I receive as Confidential Information and keep them in accordance with the Concentrix Corporate Code of Ethical Business Conduct, and the confidentiality provisions as set out in Section A of the HAA.....
> (GCX 6)

An employee reading this rule would understand that Respondent will occasionally communicate with employees using their personal email, phone, and text, and they must treat those

work communications as confidential even if they are received on the employee's personal device. Some of those emails and texts could relate to employees' wages, hours of work, or other terms and conditions of employment. On its face, the rule precludes employees from revealing or discussing with others any information about terms and conditions of employment and an employee could, and would, reasonably interpret this rule to prohibit the dissemination of any information in work-related text messages, emails, or phone calls, including information about terms and conditions of employment, with coworkers or from sharing any information to seek support of third parties in a labor dispute. Respondent's asserted business justification that the rule is necessary to maintain confidentiality does not outweigh an employee's right Section 7 rights in this instance.

Respondent maintains a "Social Networking" rule in its Code of Ethical Conduct policy which contains the following language:

> **Social Networking**
>
> The Company may require that an employee take down offensive or inappropriate material or posts, and employees are also requested to bring to our notice any such posts that they may come across on social media.
>
> ….
>
> Our Company respects your right to maintain your own blog(s) or post personal comments on social networking sites. However, our Company is committed to ensuring that the use of such communications serves the needs of our business by maintaining our Company's identity, integrity, and reputation in a manner consistent with our values and policies.
>
> ….
>
> In the case of any posts that could be connected with the Company (such as your picture with the company name or logo taken at a company event or sharing a news item or video clip of the Company), please ensure that you mention that the comments posted by you are your personal opinions and not that of the Company. In the event that the company finds such a post to be inappropriate, you may still be required to take it down. (GCX 7).

Respondent's Social Networking rule gives it complete discretion to decide whether a post serves the needs of its business and/or is appropriate and Respondent has sole discretion to require that an employee remove posts. Thus, if Respondent determines that a social media post criticizing employee wage rates and encouraging to take concerted action does not serve its business needs or is not appropriate, it can require that the employee remove the post. An employee reading this rule could reasonably interpret the rule as prohibiting any posts critical of Respondent, and its policies, and is overly broad under *Stericycle.* Respondent's proffered business justification for this rule is it wants to ensure factual communications. (Tr. 140). That business justification is not compelling when balanced against the chilling effect the rule has on employees' Section 7 rights and the rule is overly broad under *Stericycle*.

Respondent maintains a "Communicating with External Audiences" rule in its Code of Ethical Conduct policy which contains the following language:

> It is important that our Company provides fair, accurate, timely, and understandable disclosures to the public and to governmental authorities, both verbally and in writing. For this reason, only designated spokespeople are approved to respond or to communicate with outside parties — namely members of the media... If you receive a request from the media for information, for an interview, or to author a technical article or present a paper, you should forward the request to a member of our Marketing team, who will handle the request or provide support and guidance. (GCX 7)

A reasonable employee reading this rule would understand that they are not permitted to communicate with a member of the media, or other outside entity, without first notifying and receiving support and guidance from the marketing team, regardless of the nature of the request. Thus, on its face, the rule requires that a media request for an interview or quote related to an ongoing labor dispute be submitted to the marking team before the employee can respond. Such a requirement clearly interferes with employees' Section 7 rights and Respondent's assertion that

the rule is necessary to ensure factually correct information is disseminated does not outweigh the potential impact to employees' Section 7 rights. Accordingly, this rule is overly broad under the Board's test in *Stericycle.*

2. The ALJ Should Recommend that the Board 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 ALJ should Recommend Finding that 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."[14] 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

[14] 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).

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 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.*

3. 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.[15] 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 (2019). 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

[15] 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).

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 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 sheer 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.[16]

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

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

analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.").

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,[17] immediately follows the rule it saves,[18] is in a relatively short document,[19] appears in its own paragraph,[20] or appears at the end of the document, right before the signature line.[21]

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 rule in isolation, and takes into account any savings clauses. The ultimate question is not whether

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[17] *See id.* (clause referenced in same paragraph).

[18] *See Anderson Enterprises, Inc.*, *d/b/a Royal Motor Sales*, 369 NLRB No. 70, slip op. at 3 (2020).
[19] *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).
[20] *See id.*
[21] *See id*.

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 ALJ should recommend that the Board 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 ALJ should recommend the Board dispense with *Boeing*'s categories

Although the Board should readopt 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[22] 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 Category 3, depending on the specific context of the rule at issue. *Contrast Medic Ambulance*, 370

[22] 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).

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.

iv. **Under the Proposed Standard, Respondent's Privacy and Use of My Personal Information Policy, Solicitation Policy, and Proprietary Information Policy are Unlawful**

As discussed above, Respondent's Privacy and Use of My Personal Information rule requires that employees keep all emails and text messages sent by Respondent to the employee's personal email address or phone as confidential. Because it requires that "all" emails and texts be kept confidential, the rule prohibits employees from disclosing emails and texts that relate to wages, hours of work, or other terms and conditions of employment to anyone, including coworkers. Thus, on its face the rule precludes employees from engaging in protected concerted activity by disclosing and discussing wages, hours of work, and other terms and conditions of employment and should be found unlawful under the General Counsel's proposed standard.

Respondent's Solicitation and Using Technology policies are both unlawful under the proposed test. The balancing test outlined in *Rio All-Suites* establishes that Respondent cannot restrict employees access to IT systems when employees would otherwise have no reasonable

means to communicate. As was explained above, these rules unlawfully restrict employees access to the only reasonable means they have to communicate with each other and as such these two rules are unlawful.

Lastly, Respondent's "Proprietary Information" policy is unlawful under the proposed test. The rule prohibits discussion of "terms of compensation and performance levels of Company employees…," thereby prohibiting employees from discussing wages, performance reviews, and other terms and conditions of employment with coworkers and others. Thus, the rule on its face employees from engaging in protected concreted activity and is unlawful. As was explained above Respondent's asserted justification for this rule (that Respondent maintains the confidentiality) does not make sense, and is not compelling.

v. Under the Proposed Standard, Company Authorization for Publication, Social Networking, and Communicating with External Audiences rules are lawful

When analyzed under the proposed new standard outlined above, Respondent's Company Authorization for Publication, Social Networking, and Communicating with External Audiences rules should be found to be lawful as they are facially neutral.

The Company Authorization for Publication rule on its face and applies to all conduct and does not specifically preclude employees from engaging in protected concerted, or union, activity. Further, this rule only requires employees to make "deletions and revisions as are reasonably requested by the Company to protect its Proprietary Information and Inventions." As such, Respondent's business justification in ensuring it protects its "proprietary information and inventions" is compelling, and a reasonable employee would not interpret this rule to curtail their protected concerted, or union, activity.

Respondent's Social Networking policy is similarly facially neutral. The rule prohibits employees from posting "offensive or inappropriate materials," and requires that they report such

posts, but a reasonable employee would not construe this rule to mean that offensive or inappropriate material constitutes union or protected concerted activity. The requirement that employees remove inappropriate posts is also lawful, because, again, an employee would not understand "inappropriate" to cover protected concerted, or union posts. Accordingly, this rule should be lawful under the newly proposed standard.

Lastly, Respondent's Communicating with External Audiences rule should be found lawful under the newly proposed standard. This rule requires that only designated spokespersons may speak on behalf of Concentrix to outside parties, namely members of the media. Reading this rule in its entirety, an employee would understand that they are not permitted to impersonate, or otherwise make external audiences believe they are speaking on behalf of Respondent. As such, they are required to forward such requests seeking responses from Concentrix to the Marketing team. Further, a reasonable employee would not read this rule to require them to forward requests for interviews or information that seek the employee's personal opinion, or the opinion of employees as a group, with regard to a labor dispute. Accordingly, this law should be found to 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

Accordingly, Counsel for the General Counsel respectfully submits that the Administrative Law Judge should find that Respondent violated Sections 8(a)(1) of the Act as alleged in the

Complaint and Amendment to Complaint. Counsel for the General Counsel seeks a Board Order requiring that Respondent cease and desist from engaging in unlawful conduct, post a Notice to employees in English and other languages if the Regional Director determines it is appropriate to do so, text the Notice to employees employed by Respondent since January 18, 2024, and mail the Notice to the last known address of any employees who were employed by Respondent at any time after January 18, 2024, including employees who are no longer employed by Respondent. Furthermore, the General Counsel seeks an Order requiring Respondent expunge the discipline it issued to Daniel Hinton, to rescind or lawfully revise its unlawful rules, and to assure employees that it will not discriminate against them for engaging in protected concerted activities or if they discuss unions. General Counsel further seeks an Order requiring Respondent to notify employees that they are not prohibited from discussing unions in the group chat, and that Respondent will not require employees to discuss unionizing with Respondent People Solutions department.

Counsel for the General Counsel also requests that the Administrative Law Judge order any other relief deemed just and proper to effectuate the purposes of the Act.

Dated: October 29, 2026.

Respectfully submitted,

/s/ Steven Barclay

Steven Barclay, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
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ATTACHMENT

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.

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

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

YOU HAVE THE RIGHT to discuss union organizing, wages, hours, and/or other terms and conditions of employment with coworkers, and **WE WILL NOT** prohibit you engaging in such discussions or characterize such discussions as negative behavior.

WE WILL NOT tell our "work at home" employees that they are not permitted to discuss unions or solicit other employees to form a union on our Teams Chat communications system using our computer equipment and network systems when that is the only reasonable means for our "work at home" employees to communicate with one another.

WE WILL NOT tell you that you are only permitted to discuss unions with our People Solutions department, and **WE WILL NOT** prohibit you from discussing union with coworkers and other persons.

WE WILL NOT issue you a written counseling or otherwise discipline you, or require you to cease engaging in protected concerted activities as a condition of continued employment, because you exercise your right to engage in protected concerted activities by discussing union representation, with coworkers via Teams Chat using our computer equipment and network systems when that is the only reasonable means for employees to communicate with one another.

WE WILL NOT maintain or enforce any rules that require you to obtain authorization to solicit other employees during non-working time.

WE WILL NOT maintain or enforce any rules that prohibit our "work at home" employees from soliciting coworkers during non-working time via Teams Chat using our computer equipment and network systems when that is the only reasonable means for employees to communicate with one another.

WE WILL NOT maintain or enforce any rules that define terms of compensation and performance levels of employees as proprietary or confidential information.

WE WILL NOT maintain or enforce any rules that require employees to treat "all" emails and text messages received from the company as confidential.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the above- listed rights guaranteed under Section 7 of the National Labor Relations Act.

WE WILL remove from our files any references to the unlawful documented written warning issued to our "work at home" employee Daniel Hinton on or about June 22, 2024, and **WE WILL** notify him in writing that this has been done and that these actions will not be used against him in any way.

WE WILL rescind or lawfully revise all rules that are inconsistent with the above provisions of this Notice, including the rules in our Solicitation Policy, our Proprietary Information and Inventions Agreement, and our Home Agent Agreement, so they are consistent with the above provisions of this Notice, and **WE WILL** provide our employees to whom those policies and agreements are applicable with copies of the lawfully revised versions of those documents.

CONCENTRIX CVG CUSTOMER MANAGEMENT GROUP 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). Callers who are deaf or hard of hearing who wish to speak to an NLRB representative should send an email to relay.service@nlrb.gov. An NLRB representative will email the requestor with instructions on how to schedule a relay service call.

National Labor Relations Board,
Region 12
201 E Kennedy Blvd Ste 530
Tampa, FL 33602-5824

Telephone: (813) 228-2641
Hours of Operation: 8 a.m. to 4:30 p.m.

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.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Counsel for the General Counsel's Post-Hearing Brief to the Administrative Law Judge, was served on October 29, 2026, as follows:

By electronic filing:

National Labor Relations Board
Hon. Michael Rosas
Division of Judges
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Washington, D.C. 20570-0001

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