Constellation Brands, U.S. Operations, Inc. d/b/a Woodbridge Winery *and* Cannery, Warehousemen, Food Processors, Drivers and Helpers, Local Union No. 601, International Brotherhood of Teamsters. Cases 32–CA–186238 and 32–CA–186265

January 31, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On August 10, 2018, Administrative Law Judge Ariel L. Sotolongo issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs,[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Constellation Brands, U.S. Operations, Inc. d/b/a Woodbridge Winery, Acampo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from engaging in protected concerted activities by directing them to stop wearing a safety vest on which the message "Cellar Lives Matter" appears.

(b) Maintaining an Incentive (Bonus) Plan provision in its employee handbook that suggests to employees that those who choose to be represented by a union are not eligible for the Plan.

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

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

(a) Rescind the Incentive (Bonus) Plan provision in its employee handbook that suggests to employees that those who choose to be represented by a union are not eligible for the Plan.

(b) Furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

(c) Within 14 days after service by the Region, post at its Acampo, California facility copies of the attached notice marked "Appendix A" and at all other locations where the unlawful Incentive (Bonus) Plan provision has been effect, copies of the attached notice marked "Appendix B."[5] Copies of the notice, in English and Span-

[1] The General Counsel filed a motion to strike certain portions of the Respondent's supporting brief. We agree that the supporting brief includes facts not in the record. See Sec. 102.45(b) of the Board's Rules and Regulations. Accordingly, we grant the General Counsel's motion to strike.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's finding that employee Manuel Chavez engaged in concerted activity. However, the Respondent presents no argument in support of this exception. In accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations, we shall therefore disregard it. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

[3] In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(1) by directing Chavez to remove his safety vest displaying the slogan "Cellar Lives Matter," we do not rely on his statement that the Respondent failed to present evidence of employee dissension, to the extent that this statement might suggest that evidence of actual harm is required to demonstrate special circumstances justifying a ban on union insignia or other protected slogans.

In addition, we do not rely on the judge's conclusions regarding the subjective motivation of Chavez in picking the slogan, nor do we rely on his speculation about the possible legality of other hypothetical slogans. Finally, we do not find it necessary to adopt his conclusion that the Respondent's reliance on its harassment policy might have constituted a separate violation of the Act had it been alleged.

In affirming the judge's conclusion that the Respondent's handbook provision regarding its incentive plan violated Sec. 8(a)(1), Member Emanuel observes—as noted by the judge—that the Respondent's language conveyed the message that employees choosing union representation are automatically ineligible for the plan. In contrast, the Board has found benefit eligibility language lawful where it indicates that coverage for represented employees is subject to collective bargaining. See, e.g., *Handleman Co.*, 283 NLRB 451, 452 (1987).

[4] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, to correct the judge's inadvertent omission of a "narrow" cease-and-desist order, and in accordance with our decisions in *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also substitute a new notice to conform to the Order as modified.

[5] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a

ish, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since April 14, 2016. If the Respondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at those facilities at any time since April 14, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 31, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from engaging in protected concerted activities by directing you to stop wearing a safety vest on which the message "Cellar Lives Matter" appears.

WE WILL NOT maintain an Incentive (Bonus) Plan provision in our employee handbook that suggests to you that those who choose to be represented by a union are not eligible for our Plan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Incentive (Bonus) Plan provision in our employee handbook that suggests to you that those who choose to be represented by a union are not eligible for our Plan.

WE WILL furnish you with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

CONSTELLATION BRANDS, U.S. OPERATIONS, INC. D/B/A WOODBRIDGE WINERY

The Board's decision can be found at https://www.nlrb.gov/case/32-CA-186238 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an Incentive (Bonus) Plan provision in our employee handbook that suggests to you that those who choose to be represented by a union are not eligible for our Plan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Incentive (Bonus) Plan provision in our employee handbook that suggests to you that those who choose to be represented by a union are not eligible for our Plan.

WE WILL furnish you with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

CONSTELLATION BRANDS, U.S. OPERATIONS, INC. D/B/A WOODBRIDGE WINERY

The Board's decision can be found at https://www.nlrb.gov/case/32-CA-186238 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Lelia M. Gomez, Esq. and *Kenneth Ko, Esq.,* for the General Counsel.

Michael A. Kaufman, Esq. and *Matthew R. Capobianco, Esq. (Kaufman Dolowich & Voluck, LLP),* for the Respondent.

Robert Bonsall, Esq. and *Stephanie Platenkamp, Esq. (Beeson, Tayer & Bodine, APC),* for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. At issue in this case is whether a cellar department employee who wrote the slogan "Cellar Lives Matter" on his work safety vest was engaged in protected activity and unlawfully directed to stop wearing such vest, or whether such language was inherently offensive and thus devoid of protection. Also at issue is whether certain language contained in the Employer's employee handbook was facially coercive and thus unlawful.

I. PROCEDURAL BACKGROUND

Based on charges filed by Cannery, Warehouse, Food Processors, Drivers and Helpers, Local Union No. 601, International Brotherhood of Teamsters (Union or Charging Party) in cases 32–CA–186238 and 32–CA–186265, the Regional Director of Region 32 of the Board issued a consolidated complaint on January 31, 2017, alleging that Constellation Brands, U.S. Operations, Inc. d/b/a Woodbridge Winery (Respondent or Employer) violated Section 8(a)(1) of the Act by (1) directing an employee to remove and stop wearing clothing that contained the message "Cellar Lives Matter;" and (2) by maintaining and promulgating work rules in its employee handbook that interfered, restrained or coerced employees in their exercise of Section 7 rights, either because such rules could reasonably be construed by employees is such a manner or because explicitly did so. Respondent filed a timely answer to the complaint denying the substance of the allegations. I presided over this case in Oakland, California on May 3–4, 2017, and thereafter the parties submitted timely posthearing briefs.

Prior to the issuance of my decision in this matter, however, on December 14, 2017, the Board issued its seminal decision in *Boeing Co.,* 365 NLRB No. 154 (2017), which overruled parts of *Lutheran Heritage Village-Lithonia*, 343 NLRB 646 (2004), and announced new standards by which facially neutral rules should be analyzed in order to determine whether such rules violate the Act. The Board made these new standards, which

significantly change the analytical framework under *Lutheran Heritage*, retroactive and thus applicable to the instant case. Because the ruling in *Boeing Co.* appeared to directly impact some of the allegations of the complaint, I issued an order on December 15, 2017, directing the parties to file position statements discussing whether the record should be reopened to allow the parties to introduce additional evidence with regard to the rules in question. In response, the General Counsel took the position that the record need not be reopened, noting that it was separately filing a motion to withdraw paragraph 7(3) of the complaint, one of the allegations impacted by the Board's decision in *Boeing*, a position (and motion) joined by the Charging Party Union.[1] Respondent took the position that it should be allowed, pursuant to *Boeing*, to introduce evidence regarding business justifications for the remaining rule(s) in question, those in paragraphs 7(1) and (2) of the complaint. On January 12, 2018, after duly considering the parties' positions and the General Counsel's motion to withdraw paragraph 7(3) of the complaint, I issued an order approving the withdrawal of said paragraph of the complaint and directing the reopening of the record and resumption of the hearing. In doing so, I noted that the ruling in *Boeing* suggests that employers should be allowed to proffer evidence to defend or justify the existence facially neutral rules as part of the balancing test described in that ruling. In so deciding, I noted that the risk of a remand if I failed to allow the Employer to proffer additional evidence outweighed the delay that the reopening of the record would result in.[2] Accordingly, after consultation among the parties, it was agreed that the hearing would resume in Oakland on April 26, 2018.

A few days prior to the scheduled resumption of the hearing, on April 20, 2018, the General Counsel filed a motion to withdraw paragraph 7(1) of the complaint, another of the complaint allegations involving the existence of unlawful rules, as described above. The withdrawal of this allegation left only paragraph 7(2) of the complaint standing with regard to language contained in the employee handbook. Accordingly, I directed the parties to submit position statements addressing the issue of whether the reopening of the record was still warranted in light of the remaining allegation(s). The General Counsel and Charging Party took the position that a reopening was no longer warranted, whereas Respondent argued that the Board's decision in *Boeing* suggested the record should be reopened to allow it to introduce additional evidence with regard to the language in the employee handbook regarding the "Incentive (Bonus} Plan." In light of the late hour that this issue came up, and despite my strong reservations regarding whether this handbook language was a "facially neutral" rule within the scope of *Boeing*, I decided that the better side of caution favored my allowing the record to reopen, particularly given Respondent's assurances that this could be accomplished in half a day or less. Accordingly, I decided to reopen the hearing as scheduled on April 26, 2018, and the record—as predicted—was closed that same morning.

II. JURISDICTION AND LABOR ORGANIZATION STATUS

The parties agreed that Respondent is a New York corporation engaged in the production of wine in locations throughout the United States, including its facility located in Acampo, California, which is the subject of these proceedings. In conducting its business operations during the 12-month period ending on December 31, 2016, Respondent directly purchased and received products valued in excess of $50,000 from suppliers located outside the State of California. Based on these agreed-upon facts, I find that Respondent, at all material times, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act (Jt. 1).

III. FACTS

A. Background

Most of the salient facts in this case are not truly in dispute. Respondent owns and operates the Woodbridge winery, located in Acampo, near Lodi in California's central valley. Pursuant to a petition in case 32–RC–135779 filed by the Union on September 2, 2014, an election was held at Respondent's Acampo facility on February 6, 2015, in a unit comprised of Respondent's cellar department employees. The Union prevailed in this election, and was certified as the collective bargaining representative of the employees in the unit by the Regional Director on March 2, 2015.[4] Respondent refused to bargain in order to

[1] Par. 7(3) of the complaint alleged that language in Respondent's employee handbook that restricted the manner in which employees used social media to endorse or otherwise make reference to its products was unlawful. The withdrawal of this allegation left pars. 7(1) and (2) of the complaint as the remaining allegations regarding language in the employee handbook to be addressed in the case.

[2] In my ruling, I noted that in light of the Board's decision in *Boeing*, Respondent should be allowed to introduce evidence regarding its justification for the rule alleged in par. 7(1) of the complaint, which pertained to the use of secret recording devices, a rule arguably impacted by *Boeing*. On the other hand, I noted that the hearing need not be reopened to introduce evidence with respect to the allegation of par. 7(2) of the complaint, which pertained to Respondent's "Incentive (Bonus) Plan," because the language in the employee handbook that made reference to this plan did not appear to be a "facially neutral rule" within the scope of the Board's decision in *Boeing*.

[3] These facts were either admitted in Respondent's answer to the complaint (GC Exh.. 1(g)) or jointly stipulated to by the parties (Jt. Exh. 1). Transcript pages will be referred to as "Tr." Followed by the page number(s); General Counsel's exhibits are referred to as "GC Exh. followed by the exhibit number(s); and Joint Exhibits are referred to as "Jt. Exh." followed by the exhibit number(s).

[4] According to the certification, the Union was certified as the representative of the employees in the following unit:

> All full time and regular part-time operator I, operator II, senior operator, and foremen employees in the outside cellar department employees employed by the Employer at its Acampo, California Facility, excluding all other employees, office clerical employees, temporary workers, employees working in the following departments: barrel, cellar services, recycling, wine info, facilities maintenance, engineering, bottling sanitation, bottling maintenance, quality control, laboratories, warehouse, and winemaking, guards and managers and supervisors as defined in the Act.

test the appropriateness of the unit in the certification, resulting in a Board decision and order issued on July 29, 2015, in Case 32–CA–148431, *Woodbridge Winery*, 362 NLRB No. 151 (2015) (not reported in Board volumes), in which the Board found that Respondent had violated the Act by refusing to recognize and bargain with the Union. Respondent sought review of the Board's decision in the Second Circuit Court of Appeals, which refused to enforce the Board's order, in essence finding that the Board had erred in finding the certified unit as appropriate. The court remanded the case to the Board for further proceedings consistent with its decision, where the matter is currently pending. (Jt. Exhs. 1; 2; 3.)

The parties stipulated that at all material times Joshua (Josh) Shulze has been Respondent's General Manager and a supervisor within the meaning of Section 2(11) of the Act and agent within the meaning of Section 2(13) of the Act (Tr. 169; Jt. Exh. 1).[5] Additionally, uncontroverted testimony established that during the times of the events alleged in the complaint, in July-August 2016, Angela Schultz was Respondent's HR manager, and Jeff Moeckly was senior manager of Cellar Operations, formerly known as "Cellar Master." (Tr. 251; 266.)[6] Manuel (Jesse) Chavez was at all material times a bargaining unit employee of Respondent who worked as a senior operator in the Cellar Department at the Woodbridge facility. Chavez testified he was an active organizer and participant in the Union's organizational drive that occurred in 2014–2015 and provided testimony for the Union during the representation case hearing prior to the February 2015 election. Additionally, Chavez testified that employees in the bargaining unit were generally aware that the representation case was tied up by legal proceedings following the election, but that he and other employees continued to be active in the Union and discuss the situation on a weekly basis.[7]

B. The Events of July-August 2016[8]

It is undisputed that Respondent holds an annual event called "Safety Day," a mandatory-attendance event during which employees receive safety-related training. This event typically occurs in mid-summer, at the beginning of the harvest, when the winery is at its busiest at the beginning of the grape crush. In 2016, this event occurred in mid-July, and as part of the tradition, Respondent distributes tee-shirts to employees bearing a different message or logo. In 2016, the blue tee shirts distributed to employees had a logo on its front that said, "Woodbridge by Robert Mondavi, Crush 2016." On its back, the tee-shirt bore a logo that said "Straight Outta Woodbridge," in a style that replicated the logo of a motion-picture movie called "Straight Outta Compton" which had recently been showing in movie theaters.[9] It is also undisputed that many employees wore these tee-shirts at work during the coming days and weeks.

Chavez testified that he was not present, and missed work, during "Safety Day" in July because he was sick.[10] Upon his return to work on July 19, Chavez noticed many employees wearing the blue T-shirts distributed by Respondent during "Safety Day," and after discussing these tee-shirts with fellow employees, decided that he needed to respond with a prounion, pro-employee message of his own. According to Chavez, he and other employees were frustrated with the slow progress following the results of the election and ensuing lack of a contract with the Union. After considering various slogans and discussing the matter with other employees, Chavez decided on the slogan "Cellar Lives Matter."[11] At home, he wrote the slogan "Cellar Lives Matter" with a black "Sharpie," on the back of a high-visibility yellow safety vest provided by the employer that employees in the cellar department must wear at work.[12] (Tr. 46–47; 56–63; 68–69; 78; 115–116; 156.)

Chavez wore the vest with the "Cellar Lives Matter" slogan at work beginning on July 20 continuously through August 4 and was seen by many employees and even supervisors wearing it. According to Chavez, many employees made positive comments about his message, and no one complained that it was offensive. (Tr. 51–52; 70–74.)[13]

On August 4, Chavez received a radio call from supervisor John Shehorn, who asked Chavez to come to his office. When Chavez arrived, Shehorn informed him that General Manager Josh Shulze (Shulze) and Human Resources Manager Angela Schultz wanted to see him in Shulze's office, where Chavez

[5] Shulze testified that he was not only the general manager at the Woodbridge winery in Acampo, but also the general manager of two additional wineries for Respondent. (Tr. 169.)

[6] Neither Schultz nor Moeckly were alleged to be supervisors or agents of Respondent. Nonetheless, given their titles and responsibilities, it is clear that they were high-ranking managerial employees who at the very least could reasonably be seen by employees as spokespersons and agents for Respondent.

[7] I credit Chavez' testimony in this regard, which was not controverted. (Tr. 34–43.)

[8] All dates hereafter shall be in calendar year 2016 unless otherwise specified.

[9] In addition, the T-shirt had a drawing of a dove on its sleeve, in memory of an employee who had recently passed away. Photographs of the front and back of the tee-shirt were introduced in the record as GC Exh.. 3(a) and 3(b). A photo of a movie poster was introduced in the record GC Exh. 4.

[10] All dates hereafter shall refer to calendar year 2016 unless otherwise indicated.

[11] Chavez explained the "Cellar Lives Matter" theme as follows:

> We work in the elements. We work in the rain. It's hot in the valley. We work when there's heat waves. We work when it's freezing. We work at night. We work in the wind. We work up high and we work with a lot of chemicals. As a department and as individuals we put—we do everything we have to do to make sure that wine is ready for bottle ready. So therefore, Cellar Lives Matter. (Tr. 71–72.)

Chavez additionally testified that he wanted a "catchy" slogan and considered other messages such as "Let's Make the Cellar Great Again," but decided on the "Cellar Lives Matter" slogan because it was shorter and could fit in the space contained in the vest. (Tr. 69.) Chavez explained that most of the work performed by cellar department employees takes place outdoors, in an extended area larger than 10–12 football fields in size, which requires employees to use bicycles or golf carts to move around. (Tr. 48; 96–98.)

[12] A photo of the vest with the slogan written by Chavez appears in the record as GC Exh 2.

[13] Chavez testified that another employee, who he did not name, promised to also wear a vest with the same slogan, but in the end never did (Tr. 156).

then headed. Many of the essential facts of what occurred next are not in dispute, although there are some variations among the witnesses about the details of what was said at this meeting, as described below. According to Chavez, Shulze and Schultz were in the office when he arrived. Shulze told Chavez that "numerous people" found the (Cellar Lives Matter) slogan on his vest, which Chavez was still wearing, to be offensive, that people and police were getting shot all over the country.[14] Accordingly, Shulze told Chavez he could not wear the vest with the slogan anymore. Chavez asked if Shulze was requesting or demanding that he stop wearing it, and Shulze replied that he was demanding it. Chavez also testified that he said that in no way he intended the slogan to refer to or encourage attacks on the police, explaining that his son was heading to the military and eventually wanted to pursue a career in law enforcement. While admitted that he had borrowed the slogan from the "Black Lives Matter" (BLM) movement, he told Shulze (and Schultz) that in no way he intended the message to be about the police, but rather about Cellar employees mattering—in view of the arduous and sometimes hazardous work they performed. Chavez did not recall any discussion regarding the events in Dallas specifically, nor any discussion regarding the possible racial implications about a slogan derived from the "BLM" movement. He did not recall Schultz saying that she found the slogan "offensive," but instead remembers Shulze saying that numerous people found it offensive.[15] Likewise, Chavez did not recall any discussion regarding "defacing" company property, namely writing a slogan on a company-provided vest.[16] In any event, there is no dispute that Shulze directed Chavez to stop wearing the vest with the "Cellar Lives Matter" slogan, a directive that Chavez complied with immediately. Likewise, there is no evidence, or allegation, that Chavez was disciplined for wearing the vest with such slogan. (Tr. 74–78; 136–138; 140–143; 145–146; 148–149; 160–161.)[17]

Shulze, Respondent's General Manager (and admitted 2(11) supervisor), testified that he manages the Woodbridge facility in Acampo as well as two other wineries for Respondent. He first became aware of Chavez wearing the vest with the "Cellar Lives Matter" (CLM) slogan about August 1, when it was brought to his attention by HR Manager Schultz. She told Shulze that she was offended by the use of the CLM slogan and was concerned about how other employees might perceive such slogan, including a black employee in the Cellar department. Shulze responded that he was offended too ("shocked and disappointed"), and decided to contact Respondent's corporate HR department as well as legal counsel to consult with them about the matter. He also asked Schultz to speak to various supervisors to find out what they knew and what employees were "thinking." Schultz reported back to Shulze and said she had spoken to (Senior Manager) Jeff Moeckly, who said he was "disgusted" by the CLM slogan. After consulting with the corporate HR department, Shulze and Schultz decided to call Chavez into the meeting on August 4, but first met by themselves to discuss what they were going to do. (Tr. 169–171; 174–177; 215–217.)

At the August 4 meeting with Chavez, after exchanging pleasantries, Shulze asked Chavez if he knew why he had been called to the meeting. Chavez said he believed it was about the slogan on his vest. Shulze then described the "current political situation," and mentioned the Dallas shootings 3 weeks before, which was critical and was creating a lot of "bad publicity." He then said that the term "Black Lives Matter" was really not a good term as it relates to "Cellar Lives Matter," and that the term can be and is becoming offensive. He added that others were finding it offensive but were afraid to speak up. Chavez then asked, "Are you guys telling me that this is racially motivated?" Almost simultaneously, Shulze responded "no." while Schultz said "yes." Shulze testified that after a brief pause caused by their contradictory answers to Chavez' question, Schultz then said that "the current situation of Black Lives Matter and the injustice on the black people as it relates to law enforcement is a racially charged situation in this country and it's creating violent undertones throughout this country with protesting and police officers getting shot." Shulze explained, for his part, that while he may not have thought that the CLM slogan was racially motivated, it was a "poor [sic] timed, insensitive, offensive statement." He testified that Chavez stated that he did not intend the slogan in any such way, only intended it to be funny, adding that his son wanted to go into law enforcement and that he had a lot of respect for law enforcement. According to Shulze, Schultz then brought up the employer's harassment policy, explaining that employees had to refrain not only from engaging in harassment, but avoid conduct that might be perceived by others as harassment. Additionally, Shulze testified that they advised Chavez that the vest he was wearing was a safety vest provided by the employer that should not be "defaced." Chavez asked if he could write some other slogan on the vest and offered to provide examples. Shulze told him he could not write any slogans on the vest, but he

[14] For purposes of context, and as some witnesses testified, I note that this meeting occurred about 3–4 weeks after several police officers were killed or wounded by a sniper in Dallas and following weeks and months of protests by the "Black Lives Matter" movement in the wake of police shootings of unarmed black men in various cities.

[15] Chavez testified that they also discussed his absence from work on "Safety Day," when he was on sick leave, as well as discussing a payroll matter he had brought up with the HR department. These matters are not material to the issues in this case, so I find no need to elaborate on them. Rather, it appears that these subjects were brought up simply to test Chavez's recollection of what was said at this meeting, a test which I conclude Chavez passed (Tr. 116–117; 131–132.)

[16] Shulze admitted, however, that there is nothing in the employee handbook or any other written policy about "defacing" company-provided attire (Tr. 209–211; 228–229). Additionally, I note Chavez testified that during the campaign prior to the union election, an employee named Frankie Castillo had written a "Vote No" slogan on the front and back of his safety vest, which Castillo wore throughout the period up to the election (Tr. 79–80; 103–104).

[17] Chavez also testified that he was seen by a high-ranking supervisor, Jeff Moeckly (whose position at the time was "cellar master") wearing the vest with the "Cellar Lives Matter" slogan, which Moeckly allegedly approved of by saying "cool" or "right on"—which Moeckly denied, testifying instead that he showed disgust. (Tr. 73; 253.) I find the testimony of Moeckly's reaction to seeing Chavez wearing the vest with the slogan to be of little importance to the ultimate issue in this case, as discussed below.

could write his name (on the pocket), then added that he could add a slogan like "Win Your Day," a safety-related slogan which the Employer liked to use.[18] Shulze confirmed that Chavez removed his vest at the end of the meeting, as directed, and was authorized to get a new one. Finally, Shulze testified that he was aware of at least one employee who had complained to Schultz about the slogan on Chavez's vest, as had been reported to him by Schultz. [19] (Tr. 178–185; 191–193.)

Angela Schultz (Schultz) testified she was Respondent's Human Resources (HR) manager at the Acampo facility at the time of the events described above. She first became aware of Chavez wearing the vest with the CLM slogan on August 1, when HR employee Normalinda Cantu (Cantu) informed her about it.[20] According to Schultz, Cantu reported that Chavez had come to the HR office with a payroll question, and when he turned around to leave, Cantu saw the slogan written on the back of the vest. Cantu informed Schultz that she was "offended" by the slogan because of the "sensitivity of the topic in the nation at that moment," and wanted to know what management was going to do about it. Schultz informed Cantu that she was also concerned about this and thought it was very insensitive on the part of Chavez, given the close proximity of the events (police being shot) in Dallas and protests across the nation, and the slogan's play on "Black Lives Matter." Schultz wanted to know if other persons had seen Chavez's vest and commented on it, but Cantu said she had not heard anything, perhaps because both she and Schultz had been away at a conference the previous week.[21] Schultz told Cantu that she had a scheduled meeting with Shulze that day and was going to bring up the issue to his attention. Schultz testified that shortly thereafter she met with Shulze and reported what Cantu had informed her regarding Chavez' vest. She and Shulze decided they needed to consult (by phone) with Greg Gratteau, Respondent's corporate HR vice president, as well as with counsel, which they did shortly thereafter. Shulze also wanted her to find out from Jeff Moeckly, the Cellar master, what he knew about Chavez' vest, and whether anyone had complained to him.[22] (Tr. 266–273; 277–278; 280–282.)

In her testimony, Schultz confirmed that she and Shulze met with Chavez in Shulze's office on August 4. She essentially corroborated Shulze's account of what transpired during that meeting, with some minor variations that can reasonably be attributed to differences in the recollection of details given the passage of time. She testified, for example, that Shulze told Chavez his slogan could make people feel uncomfortable, harassed or intimidated, and that she mentioned the Dallas police shootings in that context. She confirmed that when Chavez asked if they were saying that his slogan was "racially motivated," Shulze said no but she said yes, explaining that Chavez's "Cellar Lives Matter" slogan was a play on "Black Lives Matter," which was a "racially-driven movement." She further testified as follows:

> . . .We talked about Black Lives Matter was a large topic in the United States at that point, and there were protests across the country, and civilians and police were losing their lives over it. So it was really sensitive and it—you know, when you look at the protests across the nation, they are pretty violent protests. And we just were concerned and did not want to invite that kind of violence at work . . .

Schultz added that Chavez said he "understood" how his slogan could be sensitive, and explained that he intended no disrespect or animus toward the police, adding that his son was interested in a career in law enforcement. Schultz confirmed that Chavez asked if they were requesting or demanding that he not wear the vest with the slogan, and confirmed that Shulze informed Chavez that it was a directive. She confirmed that Chavez asked if he could write other slogans on the vest, but was told he could not because that would be "defacing" company property and making the vest less visible, although writing "Win the Day" would be fine. Schultz additionally confirmed that they discussed other topics during this meeting, including Chavez's absence during "Safety Day," and some payroll matters Chavez had brought up (Tr. 283–289; 291–292; 299–303; 305–308).

In examining the accounts of Chavez, Shulze, and Schultz about their August 4 meeting, I find it unnecessary to make any credibility findings, because they do not contradict each other in any significant manner. Indeed, I find that all three witnesses were trying to be candid in their descriptions of what occurred at the meeting, and corroborate each other's accounts, even though Shulze's and Schultz' accounts were more detailed and extensive that Chavez's account. In that regard, to the extent that any significant contradictions may exist, I find the

[18] Shulze additionally testified that Chavez also brought up the subject of holiday scheduling, specifically the scheduling of work on the Sunday before a Monday holiday. As with other collateral matters discussed during the August 4 meeting, this issue is not material to the allegations of the complaint, and there is thus no need to elaborate.

[19] This employee was later identified as Normalinda Cantu, whom Shulze described as a Human Resources (HR) "manager" on the same level as Angela Schultz, whose testimony appears below (Tr. 207–208; 212–213).

[20] While Schultz described Cantu as an "HR Specialist" who reported to her, Shulze described Cantu as a "manager" on the same level as Schultz. Thus, the record suggests that Cantu was a manager, or at least a managerial employee.

[21] In fact, Schultz admitted that no one—other than Cantu, a manager in the HR department—ever complained about the slogan, and in particular no rank and file employees in the Cellar department where Chavez worked, including an African-American who worked there—whom Schultz believed might be offended. Schultz also testified, however, that Chavez's slogan was offensive to *her* personally (Tr. 300–303; 307–308).

[22] Schultz testified that she checked with Moeckly the following day, who reported that he had seen the vest the prior week and had been "upset and disappointed," but done nothing about it. According to Schultz, Moeckly also reported that no one had complained to him about the vest. (Tr. 280–282.) In his testimony, Moeckly confirmed that he told Schultz, when she asked, that he had seen Chavez wearing the vest with the CLM slogan during the last week of July. He added that he had not reported it earlier, despite his being "disgusted," because he had been too busy that week. He also denied Chavez's testimony that he had given Chavez a sign of approval when he first saw the slogan on the vest. (Tr. 252–255; 258–261.) He admitted, however, that under Respondent's protocol, supervisors must report any inappropriate conduct by employees immediately (Tr. 263).

more detailed accounts provided by Shulze and Schultz to be more reliable.

C. The "Incentive (Bonus) Plan" Language in the Handbook

It is undisputed, as alleged in paragraph 7(2) of the complaint, that Respondent's Employee Handbook, at page 27, under the Section 11 "Company Short-Term Incentive (Bonus) Plan" heading, contains the following language:

> *ELIGIBILITY*
> *All non-union full time and regular part-time employees of the Company are eligible for the incentive plan.*

Just above the above-cited language, under the heading of "Objective of the Plan," the Handbook describes the objective of the plan to be as follows:

- Support the Company's annual planning, budget and strategic plan
- Provide compensation opportunities that are competitive with other beverage alcohol or related industry companies in order to attract and retain key talent
- Motivate and reward employees to achieve profit and other key goals of the Company

Additionally, immediately below the "Eligibility" section quoted above, the Handbook describes other eligibility requirements that are not germane to the issues in this case, such as the time periods during which an employee must be employed to be eligible for the incentive bonus plan, etc. (Jt. Exh. 5).

During the initial hearing in May 2017, limited evidence was proffered regarding this section of the Handbook. In that regard, Shulze testified that it was a "performance-based" bonus plan for employees that was in effect in all of Respondent's non-unionized facilities throughout the country, but not in its two unionized facilities (Tr. 202; 209). As described above in the procedural history, the record was reopened on April 26, 2018, to allow the employer to proffer additional evidence regarding the Incentive (Bonus) Plan, despite my reservations as to whether this allegation fell within the preview of the Board's ruling in *Boeing*. At the reopened hearing, Respondent proffered the testimony of Dana Durand (Durand), Respondent's current HR manager at the Acampo facility, the position formerly held by Schultz. Briefly, Durand testified about the reasons and justification for the above-quoted Handbook language, and its applicability to Respondent's facilities throughout the country. For the reasons discussed below, however, I find that this testimony is ultimately not germane to the issue(s) presented, inasmuch the language in question is neither a "rule" nor "facially neutral" language within the scope of *Lutheran Heritage* and *Boeing*. Accordingly, I find it unnecessary to discuss the details or evaluate the credibility of the testimony as to that issue.[23]

IV. DISCUSSION AND ANALYSIS

A. The "Cellar Lives Matter" Issue

As discussed above, it is undisputed that for a period of about 2 weeks in late July and early August 2016, Chavez wore a safety vest at work with the slogan "Cellar Lives Matter" written with a black "Sharpie" on its backside. It is likewise undisputed that on August 4, Respondent's General Manager, Shulze, along with Human Resources Manager Schultz, directed Chavez to stop wearing such vest. At issue is whether Chavez' conduct was protected, and if so whether such conduct lost its protection because of the nature of the language used or the manner it was displayed. The General Counsel alleges and argues that Chavez' conduct was protected activity, and that Respondent violated Section 8(a)(1) of the Act by ordering Chavez to stop wearing the vest with the aforementioned slogan. Respondent argues that Chavez' conduct was not protected because it was not for "mutual aid and protection," but most of all because the slogan used was provocative, offensive and likely to cause disruption or create a hostile work environment. For the reasons discussed below, I conclude that the General Counsel has the better argument and that Respondent's conduct was unlawful.

First, I note that Chavez credibly testified that he came up with the "Cellar Lives Matter" slogan in response to the distribution of T-shirts by the company with the "Straight Outta Woodbridge" motto, which in his view promoted a pro-employer viewpoint. Most importantly, he did so in the context of a recent union organizing campaign in order to publicize and emphasize the often arduous and sometimes hazardous work performed by the workers in the Cellar department, intending to promote solidarity among the workers in that bargaining unit—who were still awaiting the resolution of a representation case entangled in legal proceedings. Finally, he did so after consulting with his coworkers, who helped him choose a slogan, even though no other workers followed his lead in wearing the slogan at work. In these circumstances, I conclude that Chavez was engaged in concerted activity protected under Section 7 of the Act when he wore the vest with the "Cellar Lives Matter" slogan at work.

The issue then becomes whether the use of such slogan was so provocative, offensive or even incendiary that it lost the protection that this activity would otherwise have enjoyed, thus allowing the employer to direct Chavez to cease such activity. In its post-hearing brief, Respondent repeatedly argues that Chavez's use of the "Cellar Lives Matter" (CLM) slogan "mocked" the "Black Lives Matter" (BLM) movement, and was therefore likely to cause disruption and offense in light of then current events, particularly because Chavez is not African-American. This argument is unpersuasive on many fronts, both factually and legally. First, on the factual side, the record is devoid of any evidence that Chavez intended to mock the BLM movement, much less that he succeeded in doing so. To the contrary, Chavez admittedly borrowed the phrase because it resonated in light of current events and was therefore more likely to catch the attention of his intended audience—his coworkers and management.[24] While the CLM slogan was

[23] Durand, however, confirmed Shulze's testimony that the Handbook was in effect in Respondent's facilities nationwide.

[24] Indeed, Chavez credibly testified that he considered using another slogan that would have also been resonant and "catchy" at the time, "Make Cellar Lives Great Again," coined after the "Make America Great Again" slogan used during the 2016 election. He decided against

arguably controversial in view of then current events, and perhaps carried a twinge of irony to it, irony is not the same as mockery, and controversial is not the same as provocative, let alone rousing or incendiary. In this regard, there is simply no evidence that the term was "racially motivated," as suggested by Schultz. In fact, it may be argued that it was management—particularly Schultz and Cantu—who improperly projected an undertone of racial significance to the slogan but coming from a completely opposite direction than suggested by Respondent in its arguments. Thus, during the August 4 meeting, Schultz suggested that the use of the CLM slogan, which evoked the BLM slogan, was highly improper in light of the recent Dallas police shootings, the event that she (as well as Shulze and the original complainer, Cantu) repeatedly emphasized. Sadly—and ironically—this insinuates that the BLM movement was in some manner, directly or indirectly, responsible for the acts of the hateful or deranged Dallas police assassin, and therefore any slogan associated with the BLM movement was too controversial and inflammatory—not because it might offend the lone African American employee in the Cellar department, as Respondent suggests, but rather because it might offend those who sympathized with the police.[25] Indeed, that insinuation explains Chavez' reaction to Schultz' comments, with Chavez explaining that he meant no disrespect or animus toward the police, and stressing the fact that his son wanted to pursue a career in law enforcement. I find this insinuation both unwarranted and unsupported by objective or empirical evidence, just as I reject the equally unwarranted and overbroad assumption that the CLM slogan might—or would—offend those who sympathized with the BLM movement.[26] In that regard, I note that not a single rank-and-file employee complained about Chavez's slogan, despite the fact that he wore it at work every day for a period of about 2 weeks, and, to the contrary, several employees signaled their approval. Moreover, even supervisors who saw Chavez' slogan shortly after he started displaying it, such as Moeckly, did not say or do anything at the time—a sure sign that the slogan was not as incendiary or provocative as Respondent asserts.[27]

From the strictly legal standpoint, Respondent's arguments are equally flawed. It primarily cites *Komatsu America Corp.*, 342 NLRB 649, 650 (2004), and *Southwestern Bell Telephone Co.*, 200 NLRB 667, 670 (1972), in support of its argument that conduct (or slogans) that are patently offensive can be proscribed if they "jeopardize employee safety . . . exacerbate employee dissension" or "cause potential disruption to the harmonious employee-management relationship" that could be triggered by the offending slogan. As the Board made clear in those and other cases (see, e.g., *Evergreen Nursing Home & Rehabilitation Center*, 198 NLRB 775, 778–779 (1972); *Nordstrom, Inc.*, 264 NLRB 698, 670 (1982)), however, special circumstances must exist before otherwise protected conduct can be proscribed in order to maintain discipline, safety or decorum. Such special circumstances existed in *Komatsu* and *Southwestern Bell*, which are clearly distinguishable from the case here. In *Komatsu*, which was a Japanese owned and operated company, the union-supporting employees wore tee-shirts that the Board found "clearly appealed to ethnic prejudices" by mentioning the Japanese attack on Pearl Harbor on December 7, 1941, in essence comparing the employer's tactics during their current dispute with the union to such "sneak attack," as the Board put it. In *Southwestern Bell*, prounion employees, in furtherance of the union's bargaining demands, wore a slogan which called the employer a "Cheap *Mother*," a universally-understood vulgar expression that refers to an individual having sexual intercourse with his own mother, a slogan the Board found was clearly offensive, disrespectful and obscene, and which exceeded the bounds of legitimate campaign propaganda.

No such "special circumstances" exist in this case. Chavez' slogan was not obscene or vulgar, nor in any way appealed to ethnic or racial prejudice, contrary to Respondent's unsubstantiated and plainly unreasonable assertion that such slogan was "racially motivated." It did not disparage Respondent's business or products, nor harmed Respondent's reputation in any way. It was an appeal for respect and recognition, which Chavez and some of his coworkers apparently hoped would one day materialize in the form of a collective-bargaining agreement. Accordingly, neither *Komatsu* nor *Southwestern Bell* is on point. Instead, *Medco Health Solutions of Las Vegas, Inc.,* 364 NLRB No. 115 (2016), best addresses the issues in this case. While that case primarily involved a message that could have potentially been seen by the employer's customers, and which the employer claimed could interfere with its image and relationship with said customers, a situation not present here, the Board's ruling regarding the employer's burden to show

its use only because it was too long to write on the limited space he had on the vest.

[25] I would further note that Schultz and Shulze also mentioned the BLM-associated "violent protests" occurring throughout the country, a violence Respondent did not want to invite, again creating the inference that the BLM movement was somehow responsible for the violence by a few anarchists. Even assuming that connection, however, I simply find it unreasonable and unwarranted to assume the use of the 'Cellar Lives Matter" slogan would somehow invite violence in the workplace.

[26] Even assuming that such slogan might offend a few individuals, I reject the notion that the fragility—or moral indignation—of a few should be the measure by which we should judge and restrain conduct that is otherwise statutorily protected. In that regard, I am skeptical that any group has a moral or legal "copyright" to the exclusive use of any socio-political (as opposed to commercial) slogan, resulting in a prohibition on the use of any similar slogans by others, even at the risk of curtailing protected activity, simply because some in that group might be "offended" by others borrowing on the theme. In the wake of a mine shaft accident that killed or injured miners, for example, could an employer reasonably prohibit the use of a "Miners Lives Matter" slogan by employees because it might "offend" some African-American miners or others? During the Civil Rights/ Freedom-Riders era, could the use of the slogan "We Shall Overcome" by workers embroiled in a dispute with their employer been prohibited for similar reasons? I would suggest that the answer is no.

[27] Moeckly—the head of the department where Chavez worked, the Cellar—had been aware of the slogan for over a week, and testified he did not do anything because he was too "busy," an explanation that I find disingenuous and unpersuasive, in light of the urgency suggested by Respondent. Indeed, he did not say anything until he was questioned by Schultz a week later, at which time he belatedly admitted being "disgusted" by the slogan.

special circumstances is right on point. Thus, the Board stated: "The burden is on the Respondent to prove the existence of special circumstances that would justify a restriction. [T]he 'special circumstances exception' is narrow, and a rule that curtails an employee's right to wear union insignia at work is presumptively invalid" Id., slip op. at 3. (internal citations omitted). While Chavez technically was not wearing "union insignia," but rather a self-created slogan, this is a distinction without a difference, inasmuch I have concluded that wearing the slogan was protected activity.

Respondent has not met its burden to show that special circumstances were present here so as to justify the ban on Chavez's slogan. Indeed, in *Medco* the Board reiterates the principle that it requires more than conjecture to support the existence of special circumstances, stating that "[a]n employer who presents only generalized speculation or subjective belief about potential disturbance…or disruption of operations fails to establish special circumstances justifying a ban" Id., slip op. at 4 (internal citations omitted). This is precisely what Respondent has done. Its managers—Shulze, Schultz and Cantu—found Chavez's slogan to be offensive and even racially motivated based merely on their subjective feelings about the slogan, without evidence to support their conclusions or evidence of employee discontent or dissension, and based merely on their speculation or conjecture about the impact that such slogan might have.[28] In that regard, I note that the Board in *Medco* stated that "the pleasure or displeasure of an employer's customers does not determine the lawfulness of banning employee display of insignia;" Id. Surely, the same principle is applicable to *managers*' pleasure or displeasure at an employee's display of insignia or otherwise protected slogan.

For the reasons I have discussed above, I reject the notion that the slogan "Cellar Lives Matter" was inherently offensive, let alone provocative or incendiary, even if it was arguably controversial. More precisely, the slogan from which it derives, "Black Lives Matter," is the one that was arguably controversial in light of then current events, and "Cellar Lives Matter" was simply a *derivative* of such slogan. Even assuming the controversial status of the original slogan, I reject the notion of guilt by association, or the notion that the original slogan, let alone a derivative, had acquired *taboo* status, such as the "N word," where its mere mention was sure to provoke dissension, confrontation or disruption. Certainly, rights protected by Section 7, which have withstood the test of time, should not be judged pursuant to the whims of passing political correctness tests.

There is an additional argument, raised by Respondent in its posthearing brief, which needs to be addressed. Respondent argues that Chavez' slogan was in violation of the "Prevention of Harassment Policy" cited on page 17 of its employee Handbook, which states that "making racist or otherwise offensive jokes, engaging in in offensive conversation, or displaying offensive literature, pictures or objects" constitutes harassment. The Handbook goes on to state that "Other conduct, even if acceptable to some employees, which creates a working environment that may be considered by others to be offensive or hostile" also constitutes harassment. Respondent further cites its "Violence in the Workplace Policy" which states, in pertinent part, that "displays of anger, resentment or hostility toward management, co-workers, or others, constitutes violence in the workplace." I would note, however, than rather than extricating or absolving Respondent from a violation of the Act by prohibiting Chavez from displaying his slogan, this defense further compounds its problems and may signal a separate violation of the Act. Under the third prong of *Lutheran Heritage Village-Lithonia*, supra., a prong which was not overruled by the Board in *Boeing* and which is therefore still in effect, an employer violates Section 8(a)(1) of the Act when it maintains and enforces a rule that is applied to restrict the exercise of Section 7 rights. Indeed, the Board found the application of a very similar rule to be unlawful in *Medco*, supra. As discussed above, I found that Chavez was engaged in protected concerted activity, and to the extent that the above-cited rule(s) has been used to proscribe his conduct, a separate violation of Section 8(a)(1) would exist.

I will not make such finding, however, because the existence (or application) of such rule was not alleged as a violation in the complaint, and arguably this issue has not been fully litigated. As discussed above, I conclude that by directing Chavez to refrain from wearing the vest with the "Cellar Lives Matter" slogan, Respondent violated Section 8(a)(1) of the Act, as alleged in paragraphs 6 and 8 of the complaint.[29]

B. The "Incentive (Bonus) Plan" Language in the Handbook

As discussed in Section "C" in the Facts section, it is undisputed that Respondent's Handbook, which has been in effect and is distributed to employees in Respondent's facilities nation-wide, contains language which expressly limits eligibility and participation in the bonus plan to employees not represented by unions. Specifically, the provision states that "All non-union full-time and regular-part time employees of the Company are eligible for the incentive plan," which by direct and clear implication, automatically disqualifies any employees represented by unions.

Board precedent is clear and unmistakable on this issue: employer rules, statements, provisions or plans that afford benefits to employees contingent on their non-representational status

[28] I have no reason to question the good faith belief by Cantu, Schultz or Shulze that Chavez' slogan was offensive to them and maybe others. Good faith belief, however, just like intent—good or bad—is irrelevant when examining whether an employer's conduct is unlawfully coercive and unreasonably restrains activity protected by Sec. 7.

[29] Respondent also argues—or suggests—that it could prohibit Chavez's slogan because it "defaced" company property, since it was written on an employer-provided vest. This argument fails on several grounds. First, there doesn't appear to be a rule in the Employee handbook that addresses such alleged "defacement." Second, such argument appears incongruent in the face of Shulze's suggestion to Chavez that he could write an employer-friendly message on his vest, such as "Win Your Day," a safety-related slogan. Finally, I note that Chaves credibly testified, without contradiction, that an employee wrote and openly wore an anti-union slogan on his vest during the days preceding the representation election, without any intervention by the employer. This would suggest disparate treatment and would support the finding of a violation on a different theory. See, e.g., *Vons Grocery Co.*, 320 NLRB 53, 55 (1995).

violate Section 8(a)(1) of the Act. *Ryder Truck Rentals, Inc.*, 341 NLRB 761, 772 (2004); *Voca Corp.*, 329 NLRB 591 (1999); *AMF Bowling Co.*, 303 NLRB 167 (1991); *Niagara Wires, Inc.*, 240 NLRB 1326, 1328 (1979).[30] As the Board explained in *Voca Corp*, supra, at 591, "the suggestion inherent in the exclusionary language [is] that unrepresented employees will forfeit the plan's benefits if they choose union representation (internal citations omitted). Likewise, a similar rationale was offered by the Board in *AMF Bowling* ("because it conveyed to employees the impression that they would lose the benefit if they ever chose union representation"). There can be little doubt that the language in Respondent's Handbook is very similar, if not identical, to the language used by the employers in the above-cited cases, and fits squarely within the boundaries of the above-cited rulings.

Respondent, citing cases like *Covanta Energy Corporation*, 356 NLRB 706, 718 (2011); *Sun Transport*, 340 NLRB 70, 72 (2003); and *Empire Pacific Industries*, 257 NLRB 1425 (1981), argues that it is not improper or unlawful to offer, or grant, different wages and benefits to union and nonunion employees. While this is certainly correct, this argument misses the entire point and the cases cited by Respondent are thus inapposite. It is not in the offering or granting of different wages and benefits that the violation lies. Rather, the sin lies in conveying the message that employees who choose union representation are automatically ineligible for any wages or benefits granted or offered to others, for no other reason than the mere fact that they chose to be represented. Employers can avoid such coercive impression by simply using language that conveys the message that wages and benefits of represented employees are ultimately subject to what the parties agree to in collective bargaining—without the inference that they are automatically disqualified.

Accordingly, and for the above reasons, I conclude that the cited language in Respondent's Employee Handbook is coercive and violates Section 8(a)(1) of the Act, as alleged in paragraphs 7(2) and 8 of the complaint.

CONCLUSIONS OF LAW

1. Constellation Brands, U.S. Operations, Inc. d/b/a Woodbridge Winery (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Cannery, Warehouse, Food Processors, Drivers and Helpers, Local Union No. 601, International Brotherhood of Teamsters (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By directing an employee to stop wearing a garment with the message "Cellar Lives Matter," and directing him not to wear such item again; and by maintaining a provision in its Employee Handbook that informs employees that those who choose to be represented by a union are not eligible for its Incentive (Bonus) Plan, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. By the conduct described above, the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

The appropriate remedy for the 8(a)(1) violations I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Respondent will be required to cease and desist from directing an employee to stop wearing a garment with the message "Cellar Lives Matter," and directing him not to wear such item again; and to cease and desist from maintain a provision in its Employee Handbook that informs employees that those who choose to be represented by a union are not eligible for its Incentive (Bonus) Plan. Moreover, Respondent will be required to post notice(s) to employees, in English and Spanish, assuring them that it will not violate their rights in this or any other related matter in the future. Respondent will additionally be required to rescind the above-referenced language in its Employee Handbook at all locations where said Handbook is in effect and distributed, and to notify its employees at all such locations, that such provision is rescinded and no longer in effect;[31] Finally, to the extent Respondent communicates with its employees by email, it shall also be required to distribute the notice to employees in that manner, as well as any other electronic means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following

[30] See, also, *Goya Foods of South Florida*, 347 NLRB 1118, 1131 (2006). This decision was issued by a two-member Board, however, and may thus be of limited precedential value. Additionally, in *Fabric Warehouse*, 294 NLRB 189 (1989), the Board held that although the actual language in the pension plan at issue was lawful, an imprecise description of such plan in the employee handbook to the effect that an employee "not be a member of a union" to be eligible, was unlawful.

[31] The General Counsel has asked that this remedy be implemented at all locations nation-wide where Respondent has maintained and distributed the Handbook with the offending provision described above. I conclude that such remedy is appropriate and warranted under the circumstances. In that regard, I note that the complaint alleges that Respondent was a "New York corporation . . . at locations throughout the United States," including its facility at Acampo, an allegation that was admitted by Respondent. I further note that the complaint put Respondent on notice that the General Counsel was seeking a nationwide remedy ordering the rescission of offending provision(s) in the Handbook; and finally, I note that Respondent's Acampo General Manager (Shulze) and its current HR manager, (Durand), testified that the Handbook was in effect at all of Respondent's facilities throughout the country, except for two unionized locations. In these circumstances, I conclude that a remedy directing the rescission of the offending language at all locations were Respondent maintains and distributes it throughout the country is appropriate. *Long Drugs Stores of California*, 347 NLRB 500, 501 (2006), and cases cited therein. In so ruling, I reject Respondent's argument that such remedy would violate due process. Nonetheless, I shall order that Respondent post two different or separate notices; one at the Acampo facility, where the conduct directed at Chavez took place, which will address that conduct as well as the language of the Handbook; the other, to be posted at all other facilities, will address the issue of the Handbook only. In that regard, I note that there is no need to post notices about the Chavez issue in facilities where employees are unaware that such conduct took place.

recommended[32]

ORDER

A. Constellation Brands, U.S. Operations, Inc. d/b/a Woodbridge Winery, Acampo California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) directing an employee to stop wearing a garment with the message "Cellar Lives Matter," and directing him not to wear such item again;

(b) maintaining a provision in its Employee Handbook that informs employees that those who choose to be represented by a union are not eligible for its Incentive (Bonus) Plan.

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

(a) Within 14 days after service by the Region, post at its facilities in Acampo, California, where notices to employees are customarily posted, copies of the attached notice marked "Appendix A."[33] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 14, 2016.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 32, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Constellation Brands, U.S. Operations, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from maintaining a provision in its Employee Handbook that informs employees that those who choose to be represented by a union are not eligible for its Incentive (Bonus) Plan.

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

(a) Within 14 days after service by the Region, post at its facilities throughout the Unites States, other than Acampo, California, where notices to employees are customarily posted, copies of the attached notice marked "Appendix B."[34] Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 14, 2016.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 32, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 10, 2018

APPENDIX A

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your mutual aid and protection

Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT dissuade or coerce employees from engaging in protected concerted activity by directing employees to stop wearing a vestment with the slogan "Cellar Lives Matter."

WE WILL NOT maintain language in our employee handbook that informs employees that only those who are not represented by unions are eligible for the Incentive (Bonus) Plan.

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[33] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[34] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL rescind such language from our employee handbook and notify employees that we have done so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

CONSTELLATION BRANDS, U.S. OPERATIONS, INC. D/B/A WOODBRIDGE WINERY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-186238 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your mutual aid and protection

Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT maintain language in our employee handbook that informs employees that only those who are not represented by unions are eligible for the Incentive (Bonus) Plan.

WE WILL rescind such language from our employee handbook and notify employees that we have done so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

CONSTELLATION BRANDS, U.S. OPERATIONS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-186238 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.