Amazon.Com Services, LLC *and* Matthew R. Littrell.
Case 09–CA–298870

March 29, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS PROUTY AND WILCOX

The General Counsel seeks summary judgment in this case on the grounds that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining an unlawful work rule restricting the access rights of its off-duty employees. The Respondent seeks summary judgment on the grounds that any violation of the Act alleged in the complaint was de minimis and effectively repudiated. As explained below, we grant the General Counsel's Motion for Summary Judgment and deny the Respondent's Cross-Motion for Summary Judgment.

Upon a charge filed by Matthew R. Littrell on July 6, 2022, the General Counsel issued a First Amended Consolidated Complaint and Order Postponing Hearing on May 2, 2023. On June 27, 2023, the Acting Regional Director for Region 9 issued an Order Severing a Complaint Allegation in Case 09–CA–298870 and Reissuing the Complaint Allegation in a Separate Complaint. The Order severed the allegation that the Respondent promulgated and maintained an unlawful off-duty employee access rule, as alleged in Case 09–CA–298870, from the remaining allegations in the First Amended Consolidated Complaint. That same day, the Acting Regional Director issued a Complaint and Order Scheduling Hearing in Case 09–CA–298870 alleging that, on or about June 30, 2022, the Respondent electronically promulgated and maintained, until on or about July 8, 2022, an unlawful off-duty employee access rule. On July 11, 2023, the Respondent filed an answer to the complaint denying the allegation and asserting certain defenses.

On August 7, 2023, the General Counsel filed a Motion to Transfer Proceedings to the Board and for Summary Judgment With Supporting Argument and exhibits. On September 1, 2023, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the General Counsel's motion should not be granted.

On November 10, 2023, the Respondent filed an Opposition to the General Counsel's Motion for Summary Judgment and Cross-Motion for Summary Judgment in Amazon's Favor, with supporting exhibits. On November 24, 2023, the General Counsel filed a Reply to the Respondent's opposition to the General Counsel's Motion for Summary Judgment. On December 12, 2023, the General Counsel filed a Position on Respondent's Cross-Motion for Summary Judgment.

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

Rulings on Motions for Summary Judgment

A. Facts

On about June 30, 2022, the Respondent electronically promulgated the following employee work rule regulating access to its facilities by off-duty employees:

> **Policy: Off Duty Access—CAN and US**
>
> **Purpose** Employee safety and security is important to Amazon, and this policy describes the safe and secure access to Amazon buildings and working areas outside of buildings. This policy allows Amazon to more easily ascertain who is present and enables Amazon to plan our support staffing, services, maintenance and related functions accordingly.
>
> **Applicability**
>
> This policy applies to WW Consumer Operations in the Canada and the United States. It applies in these businesses, excluding Physical Stores:
>
> •Amazon Transportation Services (ATS).
>
> •Global Customer Fulfillment (GCF).
>
> •Global Delivery Services (GDS).
>
> •Global Specialty Fulfillment (GSF).
>
> •Customer Service (CS)
>
> It applies to all Amazon employees working in operation sites.
>
> This includes fulltime, reduced-time, part-time, regular, flex, and seasonal employees.
>
> **Overview**
>
> During their off-duty periods (that is, on their days off and before and after their shifts), employees are not permitted inside the building or in working areas outside the building.
>
> **Additional support** If you have questions or concerns, reach out to your manager or PXT representative.

> This policy may change time to time, with or without advance notice and Amazon reserves the right to depart from the policy when deemed appropriate.

On about July 8, 2022, the Respondent electronically distributed a message notifying its employees that it had removed certain unspecified language from its June 30 electronic promulgation of its Off Duty Access policy for employees. The July 8 notification provided:

> An important note about the new Off Duty Access Policy
>
> We recently shared our new Off Duty Access Policy. The mobile A to Z webpage where the policy was hosted inadvertently included additional language, which has since been removed. The substance of the policy has not changed, and you can review it here [embedding link to revised rule].
>
> Please note, this policy will not be enforced discriminatorily against employees engaging in protected activity.

B. Analysis and Conclusions

1. There Are No Genuine Issues of Material Fact

The General Counsel alleges that the Respondent's work rule regulating access to its facilities by off-duty employees promulgated on about June 30, 2022, violates Section 8(a)(1) of the Act. The General Counsel further alleges that the Respondent maintained the unlawful rule until about July 8, 2022. The General Counsel argues that the rule as promulgated and maintained is unlawful under the Board's test for evaluating employer access rules for off-duty employees set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976).

The Respondent admits it promulgated and maintained its off-duty access rule on about June 30, 2022, and maintained the rule until about July 8, 2022. The Respondent argues, however, that the rule does not violate the test in *Tri-County Medical Center* and, even if it did, any alleged violation of the Act was de minimis and was effectively repudiated.

"It is a settled principle that for summary judgment to be appropriate the record must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Conoco Chemicals Co.*, 275 NLRB 39, 40 (1985) (citing *Stephens College*, 260 NLRB 1049, 1050 (1982)); see also *Spectrum Health Services, Inc.*, 372 NLRB No. 21, slip op. at 2 (2022). Neither the General Counsel nor the Respondent asserts that there are any material factual issues in dispute, and both parties seek summary judgment based on the undisputed facts. In the absence of any genuine issues of material fact requiring a hearing before an administrative law judge concerning the promulgation and maintenance of the Respondent's off-duty access rule, and the Respondent's conduct to attempt to cure any alleged violation of the Act, we find summary judgment is appropriate.

2. Application of Legal Principles

The Board evaluates employer access rules for off-duty employees under *Tri-County Medical Center* and will find an access rule valid only if it: "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." See 222 NLRB at 1089 ("[E]xcept where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid."). The General Counsel alleges that the Respondent's off-duty employee access rule does not satisfy prong three of the *Tri-County* test. We agree.

The Respondent's off-duty employee access rule provides that "[t]his policy may change time to time, with or without advance notice and Amazon reserves the right to depart from the policy when deemed appropriate." Board precedent fully supports finding that the Respondent's "reserv[ation of] the right to depart" from its off-duty access rule "when deemed appropriate" is unlawful under the third prong of *Tri-County* because it grants the Respondent discretion to decide when and why off-duty employees may access its facilities. In *Piedmont Gardens*, 360 NLRB 813, 813 (2014), the Board considered the employer's policy prohibiting employees from remaining on its premises after their shift "unless previously authorized" by their supervisor. The Board found that policy unlawful under the third prong of the *Tri-County* test, explaining:

> the [r]espondent's policy contains an exception, indefinite in scope, under which off-duty access is permitted with supervisory authorization. The vice in such a rule is that it gives the Respondent broad—indeed, unlimited—discretion to decide when and why employees may access the facility. [Citations and internal quotation marks omitted.]

Accord: *Southern Bakeries, LLC*, 368 NLRB No. 59, slip op. at 1–2 (2019) (finding rule against unauthorized access failed third prong of *Tri-County* because it gave the employer unlimited discretion to determine when employees may access the facility); *Lytton Rancheria of California*, 361 NLRB 1350, 1353 (2014) (the rule "provides for any additional access solely with management's approval. This last exception effectively vests management with unlimited discretion to expand or deny off-duty employees' access for any reason it

chooses . . . . The Respondent's policy thus clearly fails the third prong of the *Tri-County* test."); *Saint John's Health Center*, 357 NLRB 2078, 2082 (2011) ("In effect, the [r]espondent is telling its employees, you may not enter the premises after your shift except when we say you can."). The Respondent's off-duty access rule for employees suffers from this same vice, and is accordingly unlawful.

The Respondent seeks to distinguish these cases on the basis that its rule does not require supervisory or managerial authorization as a precondition by off-duty employees seeking to gain access to its facilities. We see no relevant difference, however, between requiring authorization and, in the instant case, "Amazon reserv[ing] the right to depart from the policy when deemed appropriate." In each instance, unlimited discretion is vested in the employer to allow access as it sees fit.[1]

The Respondent also argues that, even assuming the off-duty access rule as promulgated and maintained violated the Act, it effectively repudiated and therefore should not be held liable for the violation by promulgating a revised rule deleting the offending language that reserved the right to depart from the policy. We find that the Respondent's issuance of the revised rule did not constitute an effective repudiation that relieved it of liability for its violation of the Act.

The well-established test to determine whether an employer has adequately repudiated its violation of the Act is set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The Board explained in *Lytton Rancheria of California*:

> In order for a repudiation to serve as a defense to an unfair labor practice finding, it must be timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct. In addition, there must be adequate publication of the repudiation to the employees involved, and the repudiation must assure employees that, going forward, the employer will not interfere with the exercise of their Section 7 rights.

361 NLRB at 1353 (citing *Passavant*, 237 NLRB at 138–139). The Respondent did not adequately repudiate its violation of the Act under *Passavant* because when it notified employees that it had issued a revised rule, it failed to identify the unlawful provision contained in its rule as initially promulgated. Instead, the Respondent merely advised employees that the initial rule contained unspecified "language which has since been removed." The Respondent never identified to employees that the language "which has since been removed" had unlawfully "reserve[d] the right to depart" from its off-duty access rule "when deemed appropriate." Indeed, the Respondent did not admit any wrongdoing at all. Thus, the Respondent's asserted repudiation of its unlawful conduct entirely failed to include language "specific in nature to the coercive conduct" as *Passavant* requires. To the contrary, the Respondent declared in its revised rule that "[t]he substance of its policy had not changed."[2]

In contrast, in *ExxonMobil Research & Engineering Co.*, 372 NLRB No. 138, slip op. at 3 (2023), cited by the Respondent, the Board found successful repudiation of unlawful conduct under *Passavant* where the respondent specifically identified its coercive conduct. The respondent in *ExxonMobil* specifically advised its employees that:

> Under the National Labor Relations Act (NLRA), the Company's [Employee Information Bulletin] statement about time away from work to vote could be construed as what is called unlawful "direct dealing," meaning we bypassed the [Union] and made an offer directly to its members. That was not the Company's intention, but the Company cannot present a proposal to employees that it has not already presented to the employees' union. The Company will not engage in any direct dealing in the future.

Id. The Board found that the repudiation in *ExxonMobil* was specific in nature to the coercive conduct at issue there (direct dealing), as *Passavant* requires. Id., slip op. at 9–10.

In *TBC Corporation and TBC Retail Group Inc.*, 367 NLRB No. 18, slip op. at 2 (2018), also cited by the Respondent, the Board likewise found the respondents successfully repudiated their unlawful no-solicitation rule under the *Passavant* standard by providing employees with assurances regarding their Section 7 rights which specifically identified the unlawful provision contained in the rule.[3] The Board explained that the assurances given to

[1] The Respondent additionally argues that the third prong of *Tri-County* should be interpreted to prohibit only off-duty access rules that discriminate against union activity. Absent such discrimination, it urges the Board to read the third prong to permit limited exceptions to prohibiting off-duty access. The Respondent's rule, however, does not purport to carve out a limited exception. Rather, it is crafted in explicitly broad language allowing the Respondent to permit or deny access without limitation. As explained above, this is unlawful under established case precedent.

[2] See, e.g., *Rivers Casino*, 356 NLRB 1151, 1152 (2011) (no repudiation under *Passavant* because, inter alia, the employer did not admit any wrongdoing); *Holly Farms Corp.*, 311 NLRB 273, 274 (1994) (same), enfd. 48 F.3d 1360 (4th Cir.1995), affd. on other grounds 517 U.S. 392 (1996); *Branch International Services*, 310 NLRB 1092, 1105 (1993) (no repudiation under *Passavant* of employer's refusal to negotiate over grievances where it did not acknowledge that refusal), enfd. 12 F.3d 213 (6th Cir. 1993).

[3] The respondents in *TBC* notified employees that:

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

employees in *TBC* were specific and unambiguous.[4] The Respondent's nonspecific repudiation here falls well short of this case precedent and the requirements of *Passavant*.[5]

The Respondent additionally contends that it is entitled to summary judgment because the unlawful conduct in this case was de minimis. The Respondent argues that it maintained its unlawful off-duty employee access rule for only a limited period of time and, thus, few of its employees viewed it.[6] When unlawful conduct is "so minimal and has been substantially remedied by the Respondent's subsequent conduct," the Board may find that it does not rise to the level of constituting a violation of the Act. See *American Federation of Musicians Local 76 (Jimmy Wakely Show),* 202 NLRB 620, 620–621 (1973). In this case, however, for the same reasons discussed above, the unlawful conduct was not substantially remedied. Moreover, we cannot dismiss as insignificant that, according to the Respondent's calculations, at least some 200 employees viewed the unlawful rule. In these circumstances, we do not find it appropriate to dismiss the complaint allegation as de minimis.

Accordingly, for all these reasons, we grant the General Counsel's Motion for Summary Judgment and deny the Respondent's Cross-Motion for Summary Judgment.

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent has been a corporation with an office and place of business in Campbellsville, Kentucky, and has been engaged in the retail sale and distribution of consumer goods. During the 12-month period ending January 1, 2023, the Respondent, in conducting its operations described above, has derived gross revenues in excess of $500,000. During this time period, the Respondent sold and shipped from its Campbellsville, Kentucky facility products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky.

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

II. ALLEGED UNFAIR LABOR PRACTICES

On about June 30, 2022, the Respondent promulgated an off-duty access rule for its employees, and maintained that rule until about July 8, 2022. The rule as promulgated and maintained provides that "[t]his policy may change time to time, with or without advance notice and Amazon reserves the right to depart from the policy when deemed appropriate."

CONCLUSIONS OF LAW

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

2. By promulgating and maintaining an unlawful off-duty employee access rule which grants the Respondent discretion to decide when and why off-duty employees may access its facilities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to post and maintain the Board's notice 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.[7]

We have included language in the remedial notice informing employees that the rule has been revised to

protection; and
• Choose not to engage in any of these protected activities.
WE WILL NOT do anything that interferes with these rights.
Specifically:
WE WILL NOT promulgate or maintain Written Work rules prohibiting you from:
1) Soliciting in our buildings, on our property, or during work hours. We will continue to have a work rule that prohibits you from soliciting during an employee's working time or with another employee during that employee's working time. "Working time" does not include such time as breaks, lunch, or rest periods, or before and after work.

[4] See also *Atlas Logistics Group Retail Services (Phoenix)*, 357 NLRB 353, 357–358 (2011) (finding valid repudiation of work rules under *Passavant* where the respondent notified employees that it had revised its rules and specifically "assured them of their rights under the Act as they pertained to the rules" and emphasizing "the assurances that [respondent] gave to employees concerning the work rules").

[5] The Respondent argues that it also notified employees that its revised rule "will not be enforced discriminatorily against employees engaging in protected activity." We find this notification similarly insufficient because it does not specify the coercive conduct and does not identify or mention the unlawful provision contained in its rule as initially promulgated.

[6] As noted, the policy was promulgated on about June 30, 2022, and maintained until about July 8, 2022. The Respondent asserts that about 200 of its employees viewed the unlawful rule.

[7] The parties dispute which particular places the Respondent customarily physically posts notices to its employees, and further dispute which particular means of electronic communication the Respondent uses to communicate with its employees. We defer these issues to the compliance stage of these proceedings.

remove the unlawful provision. See, e.g., *Union Tank Car Co.*, 369 NLRB No. 120, slip op. at 6 (2020); *Lily Transportation*, 362 NLRB 406, 408 (2015).

ORDER

The National Labor Relations Board orders that the Respondent, Amazon.com Services, LLC, Campbellsville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining an unlawful off-duty employee access rule which provides that Amazon reserved the right to depart from the rule when deemed appropriate and thus grants Amazon discretion to decide when and why off-duty employees may access its facilities.

(b) 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) Within 14 days after service by the Region, post at its facility in Campbellsville, Kentucky copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 9, 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 notice is 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 to all current employees and former employees employed by the Respondent at any time since June 30, 2022.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 29, 2024

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Lauren McFerran, Chairman

_____
David M. Prouty, Member

_____
Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose 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.

On July 8, 2022, we advised you that we were promulgating a revised off-duty employee access rule which removed a provision from our previous off-duty employee access rule. That provision, which provided that Amazon reserved the right to depart from the rule when deemed

[8] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees has returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

appropriate, was alleged to violate federal labor law. The National Labor Relations Board has now found that provision is unlawful.

WE WILL NOT promulgate and maintain an unlawful off-duty employee access rule which provides that Amazon reserved the right to depart from the rule when deemed appropriate and thus grants Amazon discretion to decide when and why off-duty employees may access its facilities.

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

AMAZON.COM SERVICES, LLC

The Board's decision can be found at https://www.nlrb.gov/case/09-CA-298870 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. 20003, or by calling (202) 273-1940.