

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

B.N.F. PAINTING, LLC

and

Case 09–CA–318278

CHRISTOPHER C. HAUSER, AN INDIVIDUAL

Nell M. Kennedy, Esq. and Naima R. Clarke, Esq.,
for the General Counsel.

Joshua Crabtree, Esq.,
for the Respondent.

Decision

Kimberly R. Sorg-Graves, Administrative Law Judge.

STATEMENT OF THE CASE

On May 15, 2023, Christopher C. Hauser (Hauser), an individual, filed an unfair labor practice charge against B.N.F. Painting, LLC, (Respondent) docketed by Region 9 of the Board as case 09-CA-318278. Based upon the charge and an amendment thereto, on October 7, 2024, the Regional Director for Region 9 issued a complaint and notice of hearing alleging that Respondent prohibited employees from and threatened retaliation for discussing wages and discharged Hauser in response to his concerted activity of discussing wages. At hearing, I granted the motion by Counsel for the Acting General Counsel (General Counsel) to amend the complaint to include allegations that Respondent has maintained overly broad work rules in violation of Section 8(a)(1) of the Act. (Tr. V1: 10-15, GC Exh. 2.)¹

A trial was conducted in this matter on Tuesday, January 21 and 22, 2025, in Cincinnati, Ohio. General Counsel and the Respondent filed post-trial briefs in support of their position by March 12, 2025.

On the entire record, I made the following findings, conclusion of law, and recommendations.

¹ Abbreviations used in this decision are as follows: "Tr. V1:" for the Volume 1 of the Transcript, "Tr. V2:" for the Volume 2 of the Transcript, "Jt. Exh." for joint exhibits, "GC Exh." and "GC Br." for the General Counsel's exhibits and posthearing brief, "R. Exh." and "R. Br." for Respondent's exhibits and posthearing brief. Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid review and are not necessarily exclusive or exhaustive. My findings and conclusions are not based solely on the record citations contained in this decision but rather are based upon my consideration of the entire record for this case.

JURISDICTION

Respondent, a limited liability company with an office and place of business in Cincinnati, Ohio, has been engaged in the business of contracting to perform painting work. In conducting its operations during the 12-month period ending September 1, 2024, Respondent performed services valued in excess of \$50,000 in states other than the State of Ohio. (GC Exhs. 1(e) and 1(g).)

At all material times, B.N.F. Painting, LLC has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

Coercive Statements and Discharge Allegations

Background

From 2001 through 2017, Hauser worked as a painter through the Painter's Union. (Tr. V1: 27.) Hauser received a job offer from a long-term work acquaintance Lance Boomer, Respondent's Project Manager and project estimator, an admitted supervisor under Section 2(11) of the Act. (Tr. V1: 27, GC Exhs. 1(e) and 1(g).) Respondent is a non-unionized company that performs commercial industrial painting. (Tr. V1: 119.)

Respondent is owned by John Neyer, Robin Bramkamp, and Jason Felts, with Neyer providing the capital, Felts acting as the general manager, and Bramkamp providing capital and handling the finances. (Tr. V1: 28, 30, 57, 58, 82, 119, 121, 152, 153; Tr. V2: 7, 8.) Brent Porter was a field superintendent for Respondent and performed estimates on projects. (Tr. V1: 120, 121.) Boomer, Felts, and Hauser had worked as unionized painters together in the past. (Tr. V1: 55, 120.) Respondent employed about 15 workers when Hauser was employed. (Tr. V1: 29.)

John Neyer has ownership interests in several companies including Neyer Construction and Neyer Management. (Tr. V1: 81.) Neyer Management's Director of Human Resources and administration, HR Director Nelson, was directed to assist Respondent with human resources issues, such as assuring that on-boarding paperwork was completed, explaining benefit packages to new employees, and providing guidance with discharges. (Tr. V1: 83, 86.) Nelson was also the custodian of records for Respondent as the business wound down. (Tr. V1: 81, 82.)

Hauser started working for the Respondent as a painter on August 10, 2022.² He worked from 7:00 to 3:30 on Monday through Friday. He performed work on residential and commercial buildings, some of which were prevailing wage jobs. (Tr. V1: 29.) Sometimes he would work on multiple jobs in the same week, and other projects lasted more than a week. (Tr. V1: 45.) Respondent's field supervisor, Porter, testified that he was surprised that Hauser was not familiar with all their work processes considering that he had worked as a painter for a long time. Porter also received some complaints from contractors that Hauser took too many smoke breaks and talked too much. Porter relayed these complaints to Hauser. (Tr. V1: 145.)

² All dates are in 2022 unless otherwise indicated.

Hauser Engages in Protected Concerted Activity

5 On October 4, Hauser was working with another employee repainting a laboratory building when the other employee questioned him about the wage he was receiving. The other employee understood that the work would be paid at prevailing wage rates, but Hauser explained that he thought he was receiving a lower wage. (Tr. 66.) The other employee called Lance Boomer on speaker phone so that Hauser could hear. Boomer confirmed the employee's understanding that the work would be paid at prevailing wage rates. (Tr. V1: 31, 32, 33, 50, 51.) Boomer knew that they were working at the same location, but Boomer was not specifically told that Hauser could hear the phone conversation. (Tr. 66, 67.)

15 Hauser was not aware of any other employee being disciplined for discussing wages, including the employee who called Boomer on October 4. (Tr. V1: 49, 50–52, 54.) On cross-examination, Hauser testified that employees were allowed to talk about their wages. (Tr. V1: 54.) I find that given the overall context of the questioning and Hauser's responses; Hauser was not explaining Respondent's position on the issue. Instead, he was asserting his understanding of employee rights. When questioned about whether employees were allowed to have conversations about wages, he responded, "Nobody was there to say otherwise" and later clarified that no member of management was present. (Tr. V1: 56, 67, 68.)

20 The record is unclear as to when this conversation took place but at some point during Hauser's employment, Nelson had a discussion with Boomer and Felts about Hauser. She recalled:

25 It was that there was (sic) employees upset over a situation with Christopher Hauser and discussing wages, and the employees were upset because they felt as though he was not completing the work, and they were working really hard to earn their paycheck, and they felt like that wasn't right. There was a discussion about, you know, ramifications. I had acknowledged to them that there could be no discipline, that he was able to talk about his wages. And that was the extent of it. (Tr. V1: 84-85.)

30 On November 23, Hauser was performing exterior painting work on a commercial building. He had worked on the project for more than a week before November 23. (Tr. V1: 34.) A Neyer Construction management trainee was present to oversee the work. While Hauser was on a break, the management trainee started a conversation with him about a crossbow Hauser had in his vehicle. The trainee said that he was interested in purchasing one. At some point their conversation shifted to wage rates. (Tr. V1: 49.) Hauser said that he had received prevailing wage rates at his last job and the trainee commented that it would be nice to get that wage rate. (Tr. V1: 35, 36, 68.) When Hauser left the job that day, there was about a half day of work to be performed on the job. (Tr. V1: 34.)

Respondent's Reaction to Hauser's Protected Activity

45 The day after Hauser's conversation with the management trainee was Thanksgiving. Mgr. Boomer sent out a group text informing the workers that they were closed both Thursday and Friday. (Tr. V1: 37.) Hauser texted Boomer back and requested the following Monday off to go deer hunting, which Boomer granted. (Tr. V1: 37, 38.)

50 On Monday, November 28, at 12:55 p.m., while out hunting, Hauser received a text message from Boomer. (Tr. V1: 37.) Jason Felts was also on the text chain. The text chain reads:

Boomer:

Chris, Just letting you know that Friday was your last day working with us. We heard that you had talked about how much money we are paying you and we can't have that here. Also we are getting a little slow.

5 Hauser:

I didnt know that was not to be talked about. Call me im out in the woods. I didnt mean to cause a problem. I really like the job. Can this be discussed.

Boomer:

This can't be discussed as of now. Sorry (Tr. V1: 37, 39, 59, 60; Jt. Exh. 1.)

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Hauser discussed his discharge with family members who believed it to be illegal to fire someone for discussing wages, which prompted Hauser to search the internet for answers. (Tr. V1: 40.) At the end of November or the beginning of December, Hauser texted Boomer:

Hauser:

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U can't fire me for saying what I make its against the law. So what is real reason. ?

Boomer:

We are getting slow. But you should of never talked about wages

Hauser:

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So am I fired or not ?

Boomer:

You should text Jason. But yes you are. With further questions (Tr, 60; Jt. Exh. 2.)

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Shortly after this exchange, Hauser received the following text from Jason Felts:

Hey I just talked to Lance. The reasoning for letting you go was for lack of work. Yes you did speak to other people about pay and that really shouldn't have been done. Some things are better kept to yourself. But it's not against the law. So with that being said you are laid off for lack of work. If we come upon something we may call you back. Until then thank you for what you have done for BNF Painting. (Tr. V1: 43, 60; Jt. Exh. 3.)

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Hauser had no further contact with Respondent. (Tr. V1: 44.) In an email on November 28, Boomer directed HR Dir. Nelson to record Hauser's discharge as a layoff due to lack of work. (Tr. V1: 84; GC Exhs. 4 and 5.) Hauser applied for unemployment compensation and listed that he was laid off by Respondent for lack of work as Respondent stated. (Tr. V1: 62.) Hauser testified that he listed what he believed to be a false reason for leaving Respondent's employment because other responses, such as being fired, would not result in him receiving unemployment benefits. (Tr. V1: 64.) Respondent contends that this admission by Hauser renders him not credible in this proceeding.

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As a matter of principle, I decline to find an employee not credible for listing the reason stated by his employer for his removal on unemployment documents, regardless of the employee's belief as to the accuracy of the reason. An employer must take the burden of their own statements even if doing so includes a duty to pay unemployment and later to be found to have engaged in an unfair labor practice. In this case, Hauser's tone of voice and cadence in speaking changed when accused of lying then or now indicating that he knew his response was important. Yet, he still testified that he listed the reason provided by Respondent even when he doubted its accuracy, because he knew that was what would provide him with unemployment. I find honesty, not lack of candor in this response.

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Respondent's Contention that Hauser was Laid off for Lack of Work

5 Felts testified that Hauser was laid off for lack of work and denied that Hauser was discharged for discussing wages.³ (Tr. V1: 131, 134.) Despite that claim, Felts testified that Hauser "wasn't real productive" and complained about "him talking a lot, and making my other employees disgruntled." (Tr. V1: 120, 121.) Felts stated that a few of them were disgruntled because Hauser "discussed his wages" and once sat eating a snack and saying he did not make enough money to do the work while the other employees worked. (Tr. V1: 121.) According to Felts, Hauser was paid more than 90% of his employees. (Tr. V1: 135.) Felts testified that HR Director Nelson told him that there was nothing they could do about Hauser discussing wages because "[i]t's not against the law." (Tr. V1: 131.) The record is not clear about when this conversation happened. If it occurred before November 28, Felts ignored that warning in texting Hauser that they could not have employees discussing wages.

15 Even at the hearing, Felts' animosity towards employees discussing wages had not changed. Felts testified, "I don't think it's right. I mean, it's - makes people disgruntled. I mean, you can do what you want to do, but, I mean, it's -- how you do it makes a big difference." Felts went on to say that all the employees working with Hauser complained. Felts' animosity towards talking about wages did not end there. He went on to state, "I mean, it -- it's nobody else's business how much money you make. I mean, you're just beating down the morale of other people that don't make as much as you. You might be doing less than the next guy. It's not worth talking about." (Tr, V1: 135.) Despite Felts' repeated comments that he opposed Hauser's discussion of wages, he contended that Hauser was laid off due to lack of work. As discussed more below, I decline to find that Felts' strong animus against Hauser's discussion of wages did not play a role in the determination to lay off Hauser.

25 Felts testified that it is common for work to slow in the winter because it is often too cold to paint outside, but that layoff typically occurred in January as is evident in the list of employees' employment history. (Tr. V1: 123; V2: 14; GC Exh. 7.) Felts also contends that management had a meeting in November or December 2022 and decided to close the business because it was not profitable enough. He claims that they agreed to start the process of closing in January 2023, but later reversed course to provide continued health insurance to his family.

Respondent's Staffing Levels

35 A review of Respondent's employment history reveals that Hauser was the least senior employee at the time he was laid off. Felts testified that they recall the most productive employees. (Tr. V1: 130.) Employee Macke, who was originally hired before Hauser and resigned to work for another employer was rehired on January 3, 2023. A new apprentice and an employee trained in hanging wallpaper were hired in 2023. All other employees rehired after Hauser's layoff had originally started working for Respondent before Hauser. (GC Exh. 7.)

40 2022 January – 2 laid off for lack of work, 1 terminated
 March to July – 11 hired/rehired, 1 terminated, 1 resigned
 August – Hauser hired, 1 terminated, 2 resigned
 September – 1 hired, 1 terminated, 1 resigned
 October – 1 hired, 2 last employees hired are terminated

³ Supervisor Porter testified that painting work regularly slowed during the winter causing employees with the least seniority to be laid off. (Tr. V1: 147.) Porter is still employed by Jason Felts performing painting work with at least 1 other employee. (Tr. V1: 149, 150.)

– end October tally 14 hired, 12 dismissals, approximately 11 employed
 November – Hauser, the last hired of the remaining employees, laid off
 2023 January – 1 employee had been hired before Hauser and left Respondent for
 5 another job in September and was rehired on January 3.
 – 2 least senior employees laid off for lack of work⁴,
 – end of January Respondent employed approximately 9 employees
 February – 1 terminated
 March – 1 of the employees laid off in January recalled—earlier original hire date
 10 than Hauser
 May – 1 new hire—an apprentice
 September – 1 new hire—wallpaper hanger experience
 December – 2 laid off for lack of work
 – end of 2023 Respondent employed approximately 9 employees
 2024 February – 1 resigned/terminated
 15 July – 2 employees and 2 managers laid off for lack of work
 September – remaining 6 employees and 2 managers laid off for lack of work
 (Tr. V1: 155; GC Exh. 7.)

When Hauser was laid off, Respondent employed approximately 10 employees and
 20 maintained about 9 employees through 2023. By September 2024, Respondent had laid off its
 remaining employees. Felts testified that they first started discussing closing the business due to
 cash flow problems in November 2022. (Tr. V1: 125.) Typically, they were subcontracted to
 perform the painting work and often were not paid by the contractors in a timely fashion. The
 25 company had difficulty attracting enough business to alleviate the cash flow problem. (Tr. V1: 155;
 Tr. V2: 11, 12.) Felts and Neyer testified that they decided in the fall of 2022 to close the business
 and backed off bidding on new jobs in January 2023, but Bramkamp testified that the final decision
 to close the business did not occur until January 2023. (Tr. V1: 125, 156, 157; Tr. V2: 13, 40,
 42.) That decision was reversed in June 2023 because Felts needed to maintain family health
 30 insurance and a stable income due to the serious illness of a family member. To maintain the
 business, they started bidding on shorter jobs again. (Tr. V1: 127, 129, 157; Tr. V2: 14, 15.)
 Respondent submitted documents summarizing its expenditures and revenues, illustrating its
 continued difficulty with maintaining a balance between the two. (Tr. V2: 20-37; R. Exhs. 8 and
 9.) Ultimately, Respondent stopped employing painters in September 2024. (GC Exh. 7.)

35 Respondent's Work Rules

General Counsel contends that the following portions of Respondent's Employee Manual
 that was in effect since July 15, 2021, violates Section 8(a)(1) of the Act. (GC Exhs. 2 and 3.)
 40 Employees received the manual as part of the employee handbook when they started work. (Tr.
 V1: 101, 114, 115.)

⁴ In response to leading questions by Respondent Counsel, Felts testified that employee Kessler was laid
 off due to lack of work. Despite being led to this answer, Felts insisted on pointing out that the employee
 was also let go for poor performance and "messing up a lot of stuff for us." (Tr. 137.) Felts was not asked
 why the other employee listed was laid off later in January 2023. Considering Felts repeated testimony
 that he looked at other factors besides seniority and workload, his testimony calls into question the full
 accuracy of the document listing the reasons employees left Respondent. (Tr. V1: 129, 130; GC Exh. 7.)

3.2 NON-DISCLOSURE/CONFIDENTIALITY

The protection of confidential business information and trade secrets is vital to the interests and success of B.N.F. Painting, LLC. Such confidential information includes, but is not limited to, the following examples:

- Compensation data,
- Financial information,
- Personnel/Payroll records
- Conversations between any persons associated with the company.

All employees are required to sign a non-disclosure agreement as a condition of employment. Employees who improperly use or disclose trade secrets or confidential business information will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

SECTION 4 STANDARDS OF CONDUCT

While not intended to list all the forms of behavior that are considered unacceptable in the workplace, the following are examples of rule infractions or misconduct that may result in disciplinary action, including termination of employment.

- Boisterous or disruptive activity in the workplace; ...
- Insubordination or other disrespectful conduct; ...
- Unauthorized disclosure of business "secrets" or confidential information; ...

HR Dir. Nelson testified that the rules were not meant to preclude protected conduct but to guide conduct in specific situations. For example, she testified that the rule prohibiting boisterous, disruptive, and disrespectful conduct were necessary because the company performed work in other businesses, including schools and hospitals. (Tr. V1: 100.) She also explained that the rule concerning payroll:

it's more of a standard of if -- if someone was to lay eyes on a payroll report or a compensation report, there's other information that is sensitive in there, whether it be garnishments, benefit elections. So it's to remain -- payroll records to remain confidential, if you see something of somebody else's, it was no one -- in no form, shape, you know, to prohibit people from protected activities, but just guidelines of best practices with respecting privacy. (Tr. V1: 99.)

ANALYSIS

Coercive Statement Allegations

Section 8(a)(1) of the Act makes it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Among those rights is the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." The Board has long held that Section 7 "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment." *Triana Industries*, 245 NLRB 1258, 1258 (1979). Wage discussions among employees are "probably the most critical element in employment," and are "the grist on which concerted activity feeds." *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), *enfd.* in part 81 F.3d 209 (D.C. Cir. 1996); *Whittaker Corp.*, 289 NLRB 933, 933-934 (1988). Likewise, an employer's rule prohibiting employees from discussing their wages constitutes a clear restraint on employees' Section 7 rights to engage in concerted activities for mutual aid and protection concerning an undeniably significant term of employment and is a violation of Section 8(a)(1) of the Act. See *Automatic*

Screw Products Co., 306 NLRB 1072 (1992) (respondent violated Sec. 8(a)(1) by verbally promulgating and maintaining rule prohibiting employees from discussing their salaries and by disciplining them for violating the rule); *Leather Center, Inc.*, 312 NLRB 521, 527 (1993) (rule barring employees from any discussion of wages unlawful).

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Respondent does not refute that Felts and Boomer sent the texts stating: “We heard that you had talked about how much money we are paying you and we can’t have that here,” and “But you should of never talked about wages.” I find that the only logical interpretation of these statements is that some discipline will result if employees discuss wages. Accordingly, I find these texts sent by Boomer and Felts at the end of November 2022 are coercive and violate Section 8(a)(1) of the Act.

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Wrongful Discharge Allegation

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Wright Line Standard

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When assessing the lawfulness of an adverse employment action that turns on employer motivation, the Board applies the analytical framework set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). To sustain a finding of discrimination, the General Counsel must show that the employee's protected activity was a motivating factor in the employer's decision by establishing that: (1) the employee engaged in protected activity, (2) the employer knew of that activity, and (3) the employer had animus against the protected activity, which must be proven with evidence sufficient to establish a causal relationship between the protected activity and the adverse action. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6, 8 (2019). See also *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1-2 (2020). If evidence establishes these factors, the burden shifts to the employer to show it would have taken the same action in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1089. An employer cannot simply present a legitimate reason for its action; rather, it must persuade by a preponderance of evidence that the same action would have taken place in the absence of protected conduct. See *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015). The General Counsel may also offer proof that the employer's proffered reasons for the decision were false or pretextual. To find the proffered justification(s) pretextual, the surrounding circumstances must support an inference of unlawful motivation. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019).

Respondent's knowledge of Hauser's protected activity

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Hauser's unrefuted testimony establishes that he discussed wages with other employees on at least two occasions. The text messages from Boomer and Felts and the testimonies of Felts and Bramkamp verify that Respondent had knowledge of Hauser's protected concerted activity of discussing wages with other employees.

Animus and causation

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The Board considers circumstantial as well as direct evidence to infer discriminatory motive or animus, such as: (1) timing or proximity in time between the protected activity and adverse action; (2) delay in implementation of the discipline; (3) departure from established discipline procedures; (3) disparate treatment in implementation of discipline; (4) inappropriate or excessive penalty; and (4) employer's shifting or inconsistent reasons for discipline. *CNN American, Inc.*, 361 NLRB 439 (2014) (citing *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir.

1995); *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Praxair Distribution, Inc.*, 357 NLRB 1048, 1048 fn. 2 (2011). The Board “may infer from the pretextual nature of an employer’s proffered justification that the employer acted out . . . animus, ‘at least where . . . the surrounding facts tend to reinforce that inference.’” *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019) (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (emphasis in *Electrolux Home Products*). Pretext may be demonstrated by (1) an employer’s false reasons for an adverse action; (2) disparate treatment; (3) departure from past practice; (4) shifting explanations by an employer for an adverse action; and/or (5) the failure to investigate whether the employee engaged in the alleged misconduct. *ManorCare Health Services–Easton*, 356 NLRB 202, 204 (2010); *Windsor Convalescent Center*, 351 NLRB 975, 984 (2007), *enfd.* in relevant part 570 F.3d 354 (D.C. Cir. 2009); *Inter–Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007). Furthermore, the Board has held that even when the employer’s rationale is not patently contrived, “weakness of an employer’s reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation.” *General Films, Inc.*, 307 NLRB 465, 468 (1992).

Here, the record contains ample evidence of Respondent’s animus towards Hauser’s wage discussions. Both Boomer’s and Felts’ texts state that Hauser should not have discussed wages, and almost as an aside, mention that work is becoming slow as the reason for laying him off. Felts’ animosity towards Hauser’s discussion of wages was conveyed by the tone of his testimony and his insistence that discussing wages should not be allowed because it makes employees “disgruntle.” Felts expressed this opinion more than once, even after Respondent counsel attempted to lead him away from making such statements. Additionally, Respondent’s work rules, as discussed more below, reveal that it prohibited several forms of protected activity, again evidencing animus towards such activity.

Similarly, in Boomer’s and Felts’ texts to Hauser, his discussion of wages was repeatedly brought up as a problem before informing/confirming that he was laid off. Felts last text to Hauser states: “Yes you did speak to other people about pay and that really shouldn’t have been done. Some things are better kept to yourself. But it’s not against the law.”

Respondent’s animus towards Hauser’s protected activity is also evidenced by the timing of the discharge in relation to the last time he engaged in protected activity. Hauser discussed wages on the Wednesday before Thanksgiving and was laid off/discharged the following Monday, the first day that Respondent conducted work after the holiday.

Accordingly, I find that General Counsel met its burden of establishing that Hauser engaged in protected activity, Respondent knew of and harbored animus towards that activity. Considering the strong animus toward Hauser protected activity and the timing of the adverse action in relation to that activity, I find that General Counsel established a causal relationship between the protected activity and the discharge.

Respondent’s defense

General Counsel met its burden of establishing a prima facie case of wrongful discharge; therefore, the burden shifts to the Respondent to show it would have taken the same action in the absence of Hauser’s protected activity. Respondent contends that it did not discharge Hauser but laid him off due to lack of work. In support of this argument, Respondent points to the ongoing economic struggles of the company and its ultimate cessation of work nearly two years after Hauser left its employment. While most of Respondent’s witnesses testified that they discussed winding down the business in November 2022, they did not finalize that decision or take any actions to further it until January 2023, well after Hauser’s employment was terminated.

Respondent's witnesses also testified that Respondent experience a regular slowdown in exterior work during winter months, which could result in an overall decrease in the amount of labor it needed depending on the amount of interior work it had at the time. Respondent presented little evidence about its workflow at the end of November. The record does not contain detailed evidence about specific projects being completed and/or the start dates of other projects. Instead, General Counsel submitted documentation about ongoing and new projects starting well into 2024. In addition, Hauser testified that the project on which he had been working was not complete and there had been no indication to him that work was slowing down before he received the text stating that he was laid off. Respondent provided no explanation as to why Hauser was not allowed to finish the job he was doing on his last day of work. Respondent provided no detailed documentary evidence of a lack of work starting such as timecard records, invoices showing completion dates of contracts, etc. Nor did Respondent provide evidence of its managers engaging in a specific review of such documents in determining the need to reduce their workforce. Even if Hauser would have been laid off eventually as other employees were, that does not establish that he would have been laid off on November 28, 2022, absent his protected activity of discussing wages.

Before Respondent laid off any additional employees, it rehired a former employee in January. Based on Felts' testimony the next employee to leave Respondent's employment was in significant part discharged due to poor work performance in addition to the listed reason for his dismissal—lack of work. Felts testified that he looked at other reasons than seniority in determining who to dismiss when reducing the workforce. Respondent's counsel did not question Felts about the reasons for ending the employment of the other employee listed as laid off due to lack of work in January 2023. Thus, I find Respondent's listed reasons on General Counsel's exhibit 7 for ending the employment of its employees, including Hauser, does not tell the whole story.

In 2023, the company did not engage in the level of hiring it had done in March through July 2022. Despite this, I find that Respondent's slow winddown over the next two years is not sufficient to prove that Respondent would have discharged Hauser on November 28 absent from his protected activity.

Based on the totality of the evidence, including Felts' strong animus towards employees discussing wages, the timing of Hauser's dismissal, and the lack of definitive evidence that there was a lack of work for him to perform at the time he was let go, I find that Respondent failed to meet its burden to rebut General Counsel's prima facie case.

Accordingly, I find that Respondent's animus towards Hauser's protected activity was a contributing factor in Respondent's decision to discharge Hauser on November 28, 2022, in violation

The Allegedly Unlawful Work Rules

Legal standards for evaluating work rules

In evaluating work rules and policies, the Board considers whether the policy would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). The Board has long held that the mere maintenance of rules may violate the Act without regard for whether the employer ever applied the rule for unlawful purposes. *Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1698 (2015); *McLaren Macomb*, 372 NLRB No. 58, slip op. at 3 (2023). The Board has also found

policies requiring the relinquish of employees' future Section 7 rights unlawful. *McLaren Macomb*, supra, slip op. at 5-6.

5 If a rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). If it does not, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647; *Stericycle, Inc.*, 372 NLRB No. 113 (2023).

10 Even if rules are not unlawful on their face, they will still be found unlawful if employees could reasonably construe the portions of the policies at issue to limit the exercise of their Section 7 rights. See *Lafayette Park Hotel*, supra. With respect to facially neutral work rules that may be reasonably interpreted to restrict Section 7 activity, the Board interprets these rules "from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity." *Stericycle*, supra, 15 slip op. at 9. The Board in *Stericycle* re-established that the proper interpretive focus is from the perspective of a reasonable employee subject to a challenged work rule. *Id.* at 7-8. A "typical employee interprets work rules as a layperson rather than as a lawyer." *Id.* Finally, any ambiguity in a rule is interpreted against the drafter. See, e.g., *Lafayette Park Hotel*, 326 NLRB at 828 & fn. 22 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)). 20

If an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry their burden and the law will be found presumptively unlawful, even if a contrary, noncoercive interpretation of the rule is also reasonable. *Lafayette Park Hotel*, supra 25 at 825; *Stericycle*, 372 NLRB No. 113, slip op. at 9. That is so even if the rule could also be reasonably interpreted not to restrict Section 7 rights and even if the employer did not intend for its rule to restrict Section 7 rights. *Id.* at 9-10. However, the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. *Id.* at 10. If the 30 employer proves its affirmative defense, then the work rule will be found lawful to maintain. *Ibid.*

Respondent's non-disclosure/confidentiality rule

35 I find unlawfully overbroad the portions of Respondent's non-disclosure/confidentiality rule, which define confidential information as including compensation data, financial information, personnel/payroll records, and conversations between any persons associated with the company. The work rules also explain that sharing such confidential information can result in discipline, including discharge. These restrictions are so broad that it is easy to conceive how employees could interpret them to prohibit discussions about their wages, hours, and any conversations 40 about working conditions amongst themselves and with others through which they may seek support or representation.

In applying the re-established standard set forth in *Stericycle*, the Board has found similar clauses in work rules to be unlawfully overbroad. See, *Flex Frac Logistics, LLC*, 358 NLRB 1131 45 (2012) (employer's rule prohibiting employees from disclosing "personal information and documents" to non-employees with the threat of "termination" unlawful). The Board has long held that the ability for employees to discuss their wages amongst themselves is a core right protected by Section 7 of the Act. See, *Victory, LLC d/b/a Victory Cruises II*, 363 NLRB 1578, 1580 (2016) (finding restrictions on discussing "compensation data" unlawful on its face); *Waco, Inc.*, 273 50 NLRB 746, 748 (1984); *In re Alaska Ship & Drydock, Inc.*, 340 NLRB 874, 878 (2003); *Continental Chemical Co.*, 232 NLRB 705 (1977).

5 A reasonable employee could interpret the terms in issue to forbid protected discussions
 by employees of a broad range of information about employees, such as wages, raises, benefits,
 promotions, discipline, etc. Despite Respondent's assertion that the rules were meant to protect
 private information such as an employee's wages being garnished by a court for unpaid debts or
 child support, the language of Respondent's rules in no way limits the restrictions to more
 sensitive employee information or to employees who have access to personal information such
 as bank account and social security numbers, medical information, etc. Without a readily apparent
 alternative meaning based upon the context of the provision, reasonable employees will interpret
 10 it to mean that no employee is permitted to share employee information despite how they acquired
 that information.

15 Based on the above, I find the portions of Respondent's non-disclosure/confidentiality rule,
 which define confidential information as including compensation data, financial information,
 personnel/payroll records, and conversations between any persons associated with the company
 to be unlawfully overly broad in violation of Section 8(a)(1) of the Act.

Respondent's standards of conduct

20 General Counsel also asserts that other portions of the Respondent's standards of
 conduct are overbroad. The conduct rules allow for disciplinary action, including discharge for
 "boisterous or disruptive activity in the workplace" and "insubordination or other disrespectful
 conduct." The terms boisterous, disruptive, and disrespectful are not further defined in the policies
 distributed by Respondent. These terms are imprecise and may include disputes between
 25 employees or employees and management about Section 7 topics. *First Transit, Inc.*, 360 NLRB
 619, 621 (2014). In *Component Bar Products, Inc.* the Board affirmed a finding that rules
 prohibiting "boisterous or other disruptive activity in the workplace" and "insubordination or other
 disrespectful conduct," without any other context were unlawful. 364 NLRB 1901, 1901, fn. 1
 (2016). See also, *Schwan's Home Services*, 364 NLRB No. 20, slip op. at 5; *Casino San Pablo*,
 30 361 NLRB 1350, 1352 (2014) (rule prohibiting disrespectful conduct unlawful despite pairing with
 insubordination).

35 Finally, General Counsel contends that prohibition on "unauthorized disclosure of business
 'secrets' or confidential information" is unlawful. General Counsel asserts in posthearing briefing
 that the portion referring to "confidential information" is unlawful, especially considering
 Respondent's rule defining confidential information as including compensation data, financial
 information, personnel/payroll records, and conversations between any persons associated with
 the company. I find that in the context of Respondent's rules a reasonable employee could
 40 conclude that the reference to confidential information in this provision refers to the same
 information described above. While companies may preclude business information such as the
 disclosure of trade secrets, business contract specifics, and prices paid or received for goods or
 services, I find the reference to business "secrets" in the context of this provision does not
 preclude a reasonable employee from interpreting the provision from including items listed as
 confidential information described above. Therefore, I come to the same conclusion as I made
 45 about the confidentiality rule; the reference to business secrets and confidential information in
 Respondent's standard of conduct rule is overly broad in violation of Section 8(a)(1).

50 Accordingly, I find the portions of Respondent's standards of conduct, which prohibit
 "boisterous or disruptive activity in the workplace," "insubordination or other disrespectful
 conduct," and "unauthorized disclosure of business 'secrets' or confidential information" to be
 unlawfully overly broad in violation of Section 8(a)(1) of the Act.

CONCLUSION OF LAW

- 5 1. The Respondent B.N.F. Painting, LLC is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
- 10 2. The Respondent violated Section 8(a)(1) of the Act by,
 - a. on November 23, 2022, sending text messages to employees prohibiting them from discussing wages with other employees;
 - 15 b. on November 25, 2022, discharging Christopher C. Hauser in retaliation for engaging in concerted activities with other employees for the purpose of mutual aid and protection by discussing wages with other employees;
 - c. since on or about November 15, 2022, maintaining as a condition of employment rules that require employees to keep confidential compensation data, financial information, personnel/payroll records, conversations between any persons associated with the company; and
 - 20 d. since on or about November 15, 2022, maintaining rules that prohibit boisterous or disruptive activity in the workplace, insubordination or other disrespectful conduct, and unauthorized disclosure of business “secrets” or confidential information.
- 25 3. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

25 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

30 The Respondent, having unlawfully discharged Christopher C. Hauser, must offer him reinstatement to his former job or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges they would have enjoyed absent the discrimination against him. The Respondent shall also make Christopher C. Hauser whole for any loss of earnings and other benefits.

35 Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Consistent with *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 14 (2022), Respondent shall also compensate Christopher C. Hauser
40 for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharges, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for those harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

45 In addition, the Respondent shall compensate Christopher C. Hauser for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years, in
50 accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In accordance with *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371

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

5 Within 14 days from the date of this Order, offer Christopher C. Hauser full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

10 Compensate Christopher C. Hauser for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

15 Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and, within 3 days thereafter, notify the employee(s) in writing that this has been done and that the discharge will not be used against him in any way.

20 Rescind the employee manual nondisclosure/confidentiality rules that require employees to keep confidential compensation data, financial information, personnel/payroll records, conversations between any persons associated with the company.

Rescind the employee manual standard of conduct rules that prohibit boisterous or disruptive activity in the workplace, insubordination or other disrespectful conduct, and unauthorized disclosure of business "secrets" or confidential information.

25 Furnish employees with inserts for the current employee manual that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute revised employee manuals that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

30 Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

35 Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region

⁶ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice 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 notice 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, 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 notice is the same notice previously [sent or posted] electronically on [date]."

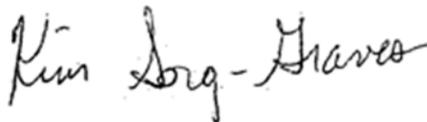
If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 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 to all current employees and former employees employed by the Respondent at any time since November 15, 2022.

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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 17, 2026



Kimberly R. Sorg-Graves
U.S. Administrative Law Judge

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT maintain overly broad work rules that require employees to keep confidential compensation data, financial information, personnel/payroll records, conversations between any persons associated with the company.

WE WILL NOT maintain an overly broad work rules that prohibit boisterous or disruptive activity in the workplace, insubordination or other disrespectful conduct, and unauthorized disclosure of business "secrets" or confidential information.

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, within 14 days from the date of the Board's Order, offer Christopher C. Hauser full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Christopher C. Hauser whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for any other direct or foreseeable pecuniary harms, suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Christopher C. Hauser for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 9 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Christopher C. Hauser, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind the rule(s) in our employee manual that unlawfully prohibit(s) you from disclosing compensation data, financial information, personnel/payroll records, conversations between any persons associated with the company and prohibits you from engaging in boisterous or disruptive activity in the workplace, insubordination or other disrespectful conduct, and unauthorized disclosure of business “secrets” or confidential information.

WE WILL furnish you with inserts for the current employee manual that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute revised employee manuals that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

B.N.F. PAINTING, LLC

(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlr.gov.

John Weld Peck Federal Building, 550 Main Street, Room 3-111, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge’s decision can be found at <https://www.nlr.gov/case/09-CA-318278> 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 SE, Washington, DC 20570-0001, or by calling (202) 273–1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER.