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

UNITED STATES POSTAL SERVICE	
and	**Case 18–CA–142795**
STEFAN GUSTAF RONNKVIST	
and	**Cases 16–CA–150064** **16–CA–161476**
BRUCE EDWARD FREEMAN, JR.	
and	**Case 15–CA–172429**
SCHWAYN BRADLEY	
and	**Case 01–CA–169707**
NATIONAL POSTAL MAIL HANDLERS UNION, BRANCH 83, LOCAL 301	
and	**Case 16–CA–181431**
ARSENIO MANANSALA	

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for Intervening Party National Postal Mail Handlers Union.

DECISION

INTRODUCTION

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These consolidated cases were tried before me on February 21–22, 2017, in Austin, Texas. The consolidated complaint alleges that the United States Postal Service (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: maintaining five (three national and two local) overly broad and otherwise unlawful policies; threatening Bruce Edward Freeman Jr. with discharge on April 10, 2015, if he continued to go to his union for assistance; enforcing one of the aforementioned unlawful policies by instructing Freeman not to record his May 18, 2015 pre-disciplinary meeting

on his cellular phone; and then discharging Freeman on June 26, 2015, because he recorded the meeting in violation of the aforementioned policy. Respondent denies the alleged violations, claiming the policies at issue are lawfully maintained to serve weighty interests unique to Respondent's status as a Federal agency, including its obligations to protect information and physical security, safeguard employee privacy, and ensure compliance with Federal statutes and regulations. Respondent further contends it did not violate the Act by its statements or actions related to Freeman.

Based on the overall evidence and current Board law, I find the policies at issue would reasonably be construed by employees as chilling their protected, concerted activity, in violation of Section 8(a)(1) of the Act. As such, I find that Respondent's enforcement of one of these aforementioned policies to prohibit Freeman from recording his pre-disciplinary meeting and to discharge Freeman for recording that meeting also violate Section 8(a)(1) of the Act. As for the remaining allegation, I find based on the credible evidence that Freeman was not threatened with discharge on around April 10, 2015, if he continued to go to his union for assistance.[1]

STATEMENT OF THE CASE

This hearing involved six consolidated cases from four different Regions. On December 15, 2014, Stefan Gustaf Ronnkvist filed an unfair labor practice charge against Respondent, which was docketed as Case 18–CA–142795. On May 27, 2015, the Regional Director for Region 18 issued a complaint in Case 18–CA–142795. On June 11, 2015, Respondent filed its answer in Case 18–CA–142795. On July 8, 2015, the General Counsel filed its motion for summary judgment in Case 18–CA–142795. On July 13, 2015, Respondent filed its opposition to summary judgment. On September 29, 2015, the National Labor Relations Board (Board) issued its order denying the motion for summary judgment. On December 3, 2015, the Regional Director for Region 18 issued an order postponing the hearing indefinitely in Case 18–CA–142795.

On April 13, 2015, Bruce Edward Freeman Jr. filed an unfair labor practice charge against Respondent, which was docketed as Case 16–CA–150064. On October 5, 2015, Freeman filed a second unfair labor practice charge against Respondent, which was docketed as Case 16–CA–161476.

On January 29, 2016, the Regional Director for Region 16 issued an order consolidating cases, the amended consolidated complaint and notice of hearing in Cases 16–CA–-150064, 16–CA–161476, and 18–CA–142795. On February 12, 2016, Respondent filed its answer to the amended complaint in Cases 16–CA–150064, 16–CA–161476, and 18–CA–142795. On February 26, 2016, the Acting Regional Director for Region 16 issued an order scheduling hearing in Cases 16–CA–150064, 16–CA–161476, and 18–CA–142795. On April 15, 2016, the Regional Director for Region 16 issued an order postponing hearing indefinitely in Cases 16–CA–150064, 16–CA–161476, and 18–CA–142795. On June 3, 2016, Respondent filed a motion to postpone hearing in Cases 16–CA–150064, 16–CA–161476, and 18–CA–142795. On June 7, 2016, the Regional Director for Region 16 issued an order denying Respondent's motion to postpone hearing. On June 8, 2016, the Regional Director for Region 16 issued an

[1] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

order rescheduling hearing issued in Cases 16–CA–150064,16–CA–161476, and 18-CA–142795. On July 15, 2016, the Regional Director for Region 16 issued an order postponing hearing indefinitely in Cases 16–CA–150064, 16–CA–161476, and 18–CA–142795.

On February 12, 2016, Branch 83, Local 301 National Postal Mail Handlers Union filed an unfair labor practice charge against Respondent, which was docketed as Case 01–CA–169707. On June 28, 2016, Branch 83, Local 301 National Postal Mail Handlers Union filed a first-amended charge against Respondent in Case 01–CA–169707.

On March 23, 2016, Schwayn Bradley filed an unfair labor practice charge against Respondent, which was docketed as Case 15–CA–172429. On May 9, 2016, Bradley filed a first amended charge against Respondent in Case 15–CA–172429. On June 23, 2016, Bradley filed a second amended charge against Respondent in Case 15–CA–172429. On August 30, 2016, the Regional Director for Region 15 issued a complaint and notice of hearing in Case 15-CA-172429. On September 12, 2016, Respondent filed its answer in Case 15– CA–172429.

On August 2, 2016, Arsenio Manansala filed an unfair labor practice charge against Respondent, which was docketed as Case 16–CA–181431.

On October 31, 2016, the Regional Director for Region 16 issued an order further consolidating cases, second consolidated complaint, and notice of hearing in Cases 18–CA–142795, 16–CA–150064, 16–CA–161476, 15–CA–172429, 01–CA–169707, and 16–CA–181431 (the Consolidated Cases). On November 14, 2016, Respondent filed its answer to the amended consolidated complaint in the Consolidated Cases.

On November 8, 2016, the American Postal Workers Union (APWU) filed a motion to intervene in the Consolidated Cases. On January 20, 2016, the Regional Director for Region 16 issued an order granting the APWU's motion to intervene. On February 10, 2017, the National Association of Letter Carriers (NALC) filed a motion to intervene in the Consolidated Cases. On February 14, 2016, the Regional Director for Region 16 issued an order granting the NALC's motion to intervene. On February 17, 2017, the National Postal Mail Handlers Union (NPMHU) filed a motion to intervene in the Consolidated Cases. On February 21, 2017, I orally granted the NMHU's unopposed motion to intervene.[2]

[2] At the hearing, I granted several unopposed motions by the General Counsel to amend the order further consolidating cases, second consolidated compliant, and notice of hearing in the Consolidated Cases. First, I granted an unopposed motion to correctly reflect the legal name of one of the Charging Parties to be National Postal Mail Handlers Union (or NPMHU), Branch 83, Local 301. At the hearing, I also granted an unopposed motion to include zip codes for the facilities in New Hampshire (03060) and Fort Worth, Texas (76161). Finally, I granted the unopposed motion to correct the spellings of Janette Bernard and Andrea D. Emos-McNary to the spellings contained in par. 5 of Respondent's answer to the amended consolidated complaint in the Consolidated Cases. Also, the current correct name of Natalie Delgado is Natalie Butler as a result of a change in her marital status, and she was referred to as both during the hearing. Also at the hearing, I granted Respondent's unopposed motion to correct its answer to reflect that it was in response to the consolidated complaint issued on October 31, 2016, not January 29, 2016. Respondent also made a motion to amend its answer to include an affirmative defense that the allegations in par. 6(a) of the complaint, related to Bruce Edward Freeman Jr.'s termination, be deferred to a February 24, 2016 arbitration award. The General Counsel objected, arguing that the motion was untimely. I granted Respondent's motion, over the General Counsel's objection, because the Board has held that deferral is an affirmative defense that may be raised at the hearing. See, e.g., *Hospitality Care Center*, 314 NLRB 893, 894 (1994).

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent, General Counsel, and the Intervening Parties filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following[3]

FINDINGS OF FACT

JURISDICTION

Respondent provides postal service for the United States and operates various facilities throughout the country. Respondent admits, and I find, that the Board has jurisdiction over the Respondent by virtue of Section 1209 of the Postal Reorganization Act (the PRA), 39 U.S.C. Secs. 101, et seq. Respondent admits, and I find, that National Postal Mail Handlers Union, Branch 83, Local 301 is a labor organization within the meaning of Section 2(5) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

1. Respondent's Rules or Policies at Issue

Respondent maintains and disseminates nationwide policies applicable to employees at all of its facilities. These policies are contained in Respondent's Employee and Labor Relations Manual (ELM), AS Handbook, and Administrative Support Manual (ASM). The provisions at issue are ELM section 667.21, AS 805 5–5(s), and ASM sections 663.4, 663.42, and 663.421.

Respondent's Employee and Labor Relations Manual (ELM) section 667.2 states, in pertinent part, the following:

> 667.2 Interception of Oral or Wire Communications by Postal Employees
>
> 667.21 Prohibition
>
> During the course of activities related to postal employment, postal employees may not record, monitor, or otherwise intercept the oral or wire communications of any other person through the use of any electronic, mechanical, or other device, nor listen in on a telephone conversation, nor direct another employee to do so, unless all parties involved in the communication are made aware of and consent to such interception.
>
> 667.22 Exceptions
>
> This prohibition does not apply to postal inspectors or Office of Inspector General investigators while acting in the course of their official duties, nor

[3] Abbreviations in this decision are as follows: "Tr" for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "Jt. Exh." for Joint Exhibit; "G.C Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

does it apply to authorized personnel conducting "Compliance and Monitoring" activities in accordance with Handbook AS-805, Information Security. All Activity conducted in this area must be in accord with applicable federal statutes governing the interception of wire or oral communications by law enforcement officers.

Call monitoring programs may be established by postal management for legitimate business purposes, such as quality assurance and training. Call monitoring programs must comply with any applicable federal statutes and regulations.

667.23 Definitions

For the purposes of 667.2, the terms *oral communication, wire communication, intercept,* and *electronic, mechanical,* or *other device* have the meanings used in 18 U.S.C. 2510.

Respondent's AS Handbook 805 5-5 states, in pertinent part, the following:

5-5 Prohibited Uses of Information Resources

Generally prohibited activities when using information resources include, but are not limited to, the following:

…

s. Using unauthorized webcams, cameras, cell phones with cameras, or watches with cameras (and other personal imaging devices) in restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, vehicles, or other Postal Service areas unless approved by area or headquarters vice president or designee for business purposes. (See Management Instruction AS882-2007-6, Postal Service Use of Retail and Cell-Phone Cameras, on the use of handheld and cell phone cameras.)

Respondent's Administrative Support Manual (ASM) Section 663.4 states, in pertinent part, the following:

Section 663.4 Permission Requests

Any Postal Service employee receiving a request from an individual, business, or other organization to publish, distribute, display, or reproduce Postal Service trademarks and copyrighted materials such as photographs, stamps, or other images, or a request to create images of Postal Service structures, employees, operations, or murals or the like must direct the request to Integration and Planning for consideration and handling. Information about the program can be found at *www.usps.com/rightsandpermissions*. All requests for permission must be submitted using the Rights and Permissions application found at *www.usps.com/rightsandpermissions*.

Section 663.42 Permission to Film and Photograph Postal Property Section

663.421 Written Permission Required

Before giving individuals, businesses, media entities, or other entities access to Postal Service vehicles, or Postal Service premises to film or take photographs, an employee must confirm that Integration and Planning has granted written permission to do so.

In addition to these nationwide policies, Respondent is divided into geographic districts, and some of these districts have local policies. At issue is the Alabama District permanent bulletin board posting which tracks ELM 667.21, and the Fort Worth District communication with the media policy, which states:

Here are our district guidelines for how to handle media inquiries, including newspaper, radio, television and social media, such as Twitter and Facebook.

The most important step, when receiving a media inquiry, request for information or comment is to refer the media representative to the proper person. All media requests should be referred to Communications Program Specialist (CPS) Arlene Sanchez.

Under no circumstances should any postal employee conduct media interviews or provide information about Postal Service matters without proper clearance and permission from Southern Area Corporate Communications.

2. Threats to and subsequent discharge of Bruce Edward Freeman, Jr.

a. Interaction with Natalie Delgado (formerly Butler)

Bruce Edward Freeman, Jr. worked for Respondent in Austin, Texas as a Postal Support Employee (PSE) from October 4, 2014 through June 26, 2015. A PSE is a non-career employee that performs various clerical tasks, including sorting mail and operating automated equipment on an as-needed basis. Freeman primarily worked tour 3, and his hours initially were from 7:30 p.m. to around 3 a.m. Bill Brock is the manager distribution operations (MDO) for tour 3.

A portion of Freeman's tour 3 shift overlapped with tour 2. During the overlap, Freeman reported to tour 2 supervisor Natalie Delgado (formerly Butler) for assignments after he finished performing his primary job duty of "pitching" priority mail. If Freeman finished pitching the priority mail, he would go and help in Delgado's area. During this period of overlap, Freeman testified that he and others began having issues with not being allowed to take their lunch breaks or having to wait to take their lunch breaks in order to provide relief for the career employees. Freeman complained to a union steward and an EEO counselor about not getting lunch breaks. Freeman testified that in April 2015 (alleged in the complaint as April 10, 2015), after making these complaints, Delgado threatened him. Freeman testified that Delgado asked him why he filed an EEO complaint and lie saying that she did not give him his breaks, and Freeman told her that he did not lie, that she was not giving him his breaks. Freeman then

testified that Delgado looked him in his face and said, "That's a lie" and that if he continued to go to the Union or participate in EEO activities, he would be fired.[4] (Tr. 66–67.)

Delgado denied making these statements. Delgado could not recall if she was aware at the time that Freeman had filed an EEO complaint, but she did not discuss it with him. She also did not talk to him about going to the union. The only conversation she recalled having with Freeman regarding his lunch break was that she needed him to cover between 1:25 and 3:30 a.m., when the other employees in her department rotated taking their lunches, so he needed to take lunch before or after that time.

b. Recording of the May 18, 2015 pre-disciplinary meeting and discharge

Freeman worked with another PSE named Raymond Brown. Freeman contends that Brown physically threatened him and other employees. Freeman spoke with some of these other employees regarding their concerns with Brown. Freeman complained to Respondent and the union.[5] He also filed EEO complaints. Freeman did not believe that Respondent was doing enough to address the situation, so he began using his cellular telephone to record interactions with Brown, as well as interactions with others. Respondent later learned that Freeman was using his phone to record conversations.

On May 18, 2015, Bill Brock called Freeman into a pre-disciplinary meeting to discuss his attendance and to inform about a change in his scheduled start time. Freeman apparently had missed work on April 23, May 1, 2, and 5–18, 2015. (R. Exh. 1).[6] Brock, Freeman's direct supervisor (Gladys Lewis), and a union representative (Larry Roberts) were present at the meeting. Freeman came into the meeting with a wash cloth over his cellular phone. Freeman testified that he listens to and records music while at work, and that he was using his phone for that purpose prior to being called into this meeting. He testified that he thought he had turned off his phone prior to going into the meeting.

At the start of the meeting, Brock told Freeman that he could not record the meeting. Brock asked Freeman more than once to leave the phone outside of the room. Freeman refused. Brock told him to make sure his phone was off. Freeman indicated that the phone was off, and that he was not recording the meeting. Freeman contends he did not become aware that he had recorded the meeting until about half an hour after the meeting ended.

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[4] At the hearing, Freeman testified another employee, Javar Jennings, was present when Ms. Delgado threatened him. (Tr. 60-61). Freeman also testified he later spoke to a union steward, Calvin Walker, about what Delgado said to him, and he asked Walker to file a grievance on his behalf. Freeman testified Walker later came back and reported that he spoke with Delgado about the matter, and that was it. No grievance was filed. (Tr. 62—62). Neither Jennings nor Walker was called to testify.

[5] Brock was aware that Brown was harassing employees, including Freeman. After Respondent suspended Brown, and he was scheduled to return to work, Brock met with Freeman to inform him that Brown was coming back to work, because of the issues Freeman had with Brown.. Brock later learned that Freeman had recorded this conversation. (Tr. 163–165).

[6] Freeman reported that he missed work because of the stress he was experiencing from the harassment at work, and that he had given Respondent a doctor's note explaining that. (R. Exh. 1).

In this meeting, Brock informed Freeman that his start time was being changed to 3 p.m. As a PSE, Freeman was expected to work a flexible schedule, and Respondent retained the right to change Freeman's hours of work. Brock needed to change Freeman's start time to meet work-flow demands.[7] Freeman informed Brock that he could not report to work at 3 p.m. because of his child care responsibilities. Brock reiterated that Freeman's start time was changing to 3 p.m.

The day after the meeting, Freeman emailed several members of management with what he characterized as a "cry out for help." (GC Exh. 2). He attached an audio recording of the May 18 pre-disciplinary meeting to the email. In his email, Freeman claimed that he was being harassed and retaliated against for filing EEO complaints and Board charges. Freeman also sent a letter to Peter Sgro, the plant manager, explaining what had occurred during the May 18 pre-disciplinary meeting, why he had missed work (i.e., stress from the harassment), and that as a single father, he could not begin work at 3 p.m. (GC Exh. 3.)

Respondent later issued Freeman a letter of warning, dated May 19, 2015, for his unacceptable attendance and failing to meet the attendance requirements of his position. The letter of warning outlined the attendance infractions and summarized the May 18 pre-disciplinary meeting. (R. Exh. 1).[8]

On June 26, 2015, Respondent issued Freeman a notice of removal because of his unacceptable performance—failure to follow instructions, and because of unacceptable conduct—misrepresentation of the truth and unauthorized interception/distribution of oral communication.[9] Specifically, Respondent discharged Freeman because he recorded the May 18 pre-disciplinary meeting with his phone, despite being told not to, in violation of ELM 667.21. He also was discharged for failing to obey Brock's order not to record the meeting and to remove the phone from the meeting room, in violation of ELM 665.15 ("Obedience to Orders").[10]

Thereafter, the union filed a grievance regarding Freeman's discharge, and the matter went to arbitration. On February 24, 2016, the arbitrator issued his ruling. (R. Exh. 2.) In reaching his decision, the arbitrator examined the evidence and the parties' arguments. Respondent contended that Freeman was discharged for violating ELM 667.21 by recording and disseminating the recording of the May 18 pre-disciplinary meeting. The arbitrator noted that there was a dispute as to whether Freeman intentionally recorded the conversation, but no

[7] The complaint does not allege Respondent violated the Act by altering Freeman's start time to 3 p.m.

[8] The complaint also does not allege Respondent violated the Act by issuing Freeman this letter of warning regarding his attendance.

[9] According to the arbitration decision, on June 5, 2015, Respondent notified Freeman that a pre-disciplinary meeting had been scheduled for June 10, 2015. Freeman did not appear at the June 10 meeting. Freeman allegedly contacted Respondent to request that the interview be over the phone. Brock refused out of concern that Freeman would also record that conversation. Respondent scheduled a second pre-disciplinary (in-person) meeting for June 19. Freeman notified Respondent that he would not attend, and that any further communication should be through his attorney. (R. Exh. 2).

[10] The complaint does not allege, and the parties did not address, Freeman's alleged violation of ELM 665.15. However, as the order Freeman failed to comply with related to policy prohibiting recording communications, my findings and conclusions also apply to that alleged rationale for his discharge.

dispute that he intentionally disseminated the recording. The arbitrator ultimately determined that Freeman intentionally recorded the conversation, despite repeated instructions not to do so, in violation of Respondent's policies.[11] However, the arbitrator ruled the discharge violated the contract because Freeman's direct supervisor had not been involved in the decision, and the decision had been made by upper management (Brock). As the remedy, the arbitrator determined that Freeman should be returned to his position provided he reports at the time directed by management, and that if he failed to report on time and as directed, without reasonable excuse, Freeman would be deemed to have abandoned his job. The arbitrator further held that in view of Freeman's conduct and statement that he would not report to work at 3 p.m. on May 19, 2015, and the fact that he did not report in the weeks thereafter, no back pay was due.

Following the arbitration decision, Respondent notified Freeman to return to work at his assigned 3 p.m. start time. There is no dispute Freeman refused to report. On May 4, 2016, Respondent issued Freeman a second notice of removal for unacceptable conduct—failing to comply with the arbitrator's decision—failure to report for duty.[12] (R. Exh 4).

ARGUMENTS & ANALYSIS

A. Did Respondent violate Section 8(a)(1) of the Act[13] by maintaining five overly broad or otherwise unlawful policies or rules?

1. *Legal Precedent*

The Board has held an employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is unlawful if "the rule explicitly restricts activities protected by Section 7." Id. at 646. If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if: (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. See also *T-Mobile USA, Inc.*, 363 NLRB No. 171 (2016); *Whole Foods Market Group, Inc.*, 363 NLRB No. 87 (2015); and *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015).

[11] Freeman declined to testify during the arbitration hearing.

[12] The complaint does not allege Respondent violated the Act when it discharged Freeman on May 4, 2016, for failing to report for duty pursuant to the arbitrator's decision.

[13] 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 [of the Act]." Section 7 provides that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities."

In determining whether a rule reasonably would be construed as chilling Section 7 activity, the Board has held the language is to be given a reasonable reading, and it is not to be considered in isolation. *Lutheran Heritage*, supra at 646. Further, any ambiguity in the language must be construed against the drafter. *Lafayette Park*, supra at 825. The Board explained that "where reasonable employees are uncertain as to whether a rule restricts activity protected under the Act, that rule can have a chilling effect on employees' willingness to engage in protected activity [, because] [e]mployees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Section 7 activity for fear of running afoul of a rule whose coverage is unclear." *Whole Foods Market Group, Inc.*, supra at slip op. 4 fn. 11.

The Board recently issued decisions in *Rio All-Suites Hotel & Casino*, *Whole Foods Market Group, Inc.*, and *T-Mobile USA, Inc.* addressing workplace rules similar to those at issue in this case. In *Rio All-Suites Hotel*, the employer maintained rules prohibiting: (1) the use of camera phones to take photos on property without permission from management, and (2) the use of cameras and any type of audio video recording equipment and/or recording devices unless specifically authorized for business purposes. The Board found the rules to be overbroad, holding that employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection, and no overriding employer interest is present. The Board cited as examples of protected conduct employees recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules. The Board held that rules at issue were overbroad because they would reasonably be read as restricting this protected conduct, and because the employer had failed to tie the need for these rules to any particularized interest warranting the restriction.

In *Whole Foods Market Group, Inc.*, the Board reached a similar result over a grocery chain's rule prohibiting employees from recording conversations, phone calls, images, or company meetings with any recording device without prior supervisory approval.[14] The Board held the rule unlawfully prohibited all workplace recording, including Section 7 activity, because the rules did not differentiate between recording on working versus nonworking time, and also because it required employees to obtain the employer's permission before recording during nonwork time. The Board rejected the employer's argument that the rules were primarily needed to preserve privacy interests (e.g., personal and medical information about team members, comments about their performance, details about their discipline, criticism of store leadership, and confidential business strategy and trade secrets), holding that the employer failed to tie the rule to these interests, and failed to narrowly tailor the rule to address these interests without unduly restricting employees' protected activity.

[14] In addition to the protected conduct referenced in *Rio All-Suites Hotel and Casino*, the Board in *Whole Foods Market Group, Inc*. also noted that a protected purpose for recording would be to preserve evidence for later use in administrative or judicial forums in employment-related actions.

In *T-Mobile USA, Inc.*, the employer had rules banning employees from recording "people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace" and prohibited employees from making "sound recordings of work-related or workplace discussions." Similar to *Whole Foods*, the Board found the rule unlawful, in part because it "did not differentiate between recordings that are protected by Section 7 and those that are not, and includes in its prohibition recordings made during nonwork time and in nonwork areas." The Board rejected the employer's argument that the rule was justified by its general interest in maintaining employee privacy, protecting confidential information, and promoting open communication, finding that "neither the rule nor the proffered justifications [for its scope] are narrowly tailored to protect legitimate employer interests or to reasonably exclude Section 7 activity from the reach of the prohibition." The Board also found no merit to the employer's contention that the rule was in place to prevent harassment, noting that the rule was not narrowly tailored to this interest, because it neither cited laws regarding workplace harassment nor specified that the restriction was limited to recordings that could constitute unlawful harassment.

In light of these decisions,[15] employees have the Section 7 right to photograph and make audio and video recordings in furtherance of their protected concerted activity. Rules placing a total ban on such photography or recordings are unlawfully overbroad where they would reasonably be read to prohibit audio or video recordings on nonworktime. However, an employer may implement and maintain a rule restricting this protected activity, so long as there is an overriding interest in doing so, and the restriction is narrowly tailored to serve that interest without unnecessarily infringing on employees ability to engage in Section 7 activity.

In *Flagstaff Medical Center*, 357 NLRB 659, 662–663 (2011), review granted in part and enfd. in part 715 F.3d 928 (D.C. Cir. 2013), the Board addressed this issue of an overriding or weighty interest. In that case, the hospital issued an updated portable electronic equipment policy to prohibit the use of electronic equipment during worktime and the use of cameras for recording images of patients and/or hospital equipment, property, or facilities. It made these changes after becoming aware that a visitor to the hospital had used a cell phone to photograph a patient, other visitors, and hospital employees. The Board majority found the rule was not unlawfully overbroad because employees would not reasonably interpret the rule as restricting Section 7 activity, noting that the interests in protecting patient privacy were weighty, and the employer had a significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography, under the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. Section 1320d. The Board found that employees would reasonably interpret this rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity.

[15] Respondent raises various arguments as to why *Rio All-Suites Hotel & Casino*, *Whole Foods Market Group*, and *T-Mobile USA, Inc.*, were wrongly decided and should not be considered controlling law. I reject Respondent's arguments. These cases remain valid Board precedent that I am bound to apply or distinguish. See generally, *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); and *Iowa Beef Packers*, 144 NLRB 615 (1963).

2. ELM 667.2 and Alabama District Bulletin Board Posting of Language from ELM 667.2

The General Counsel relies upon *Rio All-Suites Hotel & Casino*, *Whole Foods Market Group*, and *T-Mobile USA, Inc.* to argue that ELM 667.21 and the Alabama District bulletin board posting that tracked ELM 667.21 both violate Section 8(a)(1) of the Act because employees would reasonably construe them as prohibiting Section 7 activity. ELM 667.21 broadly prohibits the recording of all communications (and listening in on telephone conversations) that occur "[d]uring the course of activities related to postal employment" without the knowledge and consent of all the parties involved. The General Counsel asserts the rule is overbroad because it is not limited to work time or work areas, and there is no definition or limitation as to what constitutes "activities related to postal employment." Additionally, the General Counsel asserts that Respondent has failed to articulate an overriding interest in maintaining these rules, and/or to narrowly tailor the restriction to serve that overriding interest(s). I agree.[16]

Respondent argues that ELM 667.21 is necessary to serve several weighty interests. Respondent emphasizes its unique status as a quasi-commercial entity, operating in some ways like a federal agency and in other ways like a private business, and noting that it is the only federal-sector entity that is within the Board's jurisdiction. As a federal entity, Respondent points out that it is subject to a variety of statutory and regulatory requirements that impose weighty obligations not applicable to private sector employees, and Respondent argues that the need to comply with these statutory and regulatory requirements effectively outweighs employees' rights to engage in the Section 7 activities that may be limited by the rule.

Respondent is subject to the Privacy Act of 1974, 5 U.S.C. §552a et seq., which governs the collection, maintenance, use, and dissemination of certain information about individuals by the federal government. In particular, the Privacy Act of 1974 restricts how agencies use personally identifiable information (e.g., name, addresses, birth dates, and Social Security numbers), and requires that agencies adopt adequate safeguards to protect against the improper dissemination of this type of information. Respondent also is subject to Section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16(a), which authorizes the Equal Employment Opportunity Commission (EEOC) to adopt regulations to implement Title VII of the Civil Rights Act in the federal sector. As part of that process, the EEOC has promulgated an internal EEO-complaint procedure, which includes initial counseling, mediation, and, if necessary, a formal investigation. 29 C.F.R. §§1614.101–1614.110. At each stage in the EEOC process, there are obligations about maintaining confidentiality. Similarly, Respondent is subject to the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq., which requires, among other responsibilities, that it must keep all medical information separate and confidential. Finally,

[16] The General Counsel further contends ELM 667.21 also violates Sec. 8(a)(1) of the Act because Respondent applied the rule to discharge Freeman for engaging in protected concerted activity when he recorded the May 18, 2015 pre-disciplinary meeting. I agree. There is no dispute Respondent applied this policy in deciding to discharge Freeman on June 26, 2015, because he recorded the meeting, which I find to be protected, concerted activity because Freeman did, in part, out of concern that he would retaliated against for going to the union, filing EEO complaints, and filing NLRB charges related to the treatment he and others received.

Respondent is subject to the requirements of its own enabling statute, the Postal Reorganization Act (PRA), which prohibits its officers or employees from releasing the name or address of a customer. Overall, Respondent contends that ELM 667.21 is necessary to ensure its compliance with these various statutory and regulatory requirements. In particular, Respondent argues the broad scope of ELM 667.21 preserves confidentiality in a number of contexts, such as in the EEO processes required under Title VII and the Rehabilitation Act.[17] Respondent also argues that the policy is necessary for harmonious labor-management relations because it allows the parties to speak in confidence to resolve issues, without fear that their words will be twisted or thrown back at them out of context.[18]

Respondent also contends that the policy's context clarifies its true purpose, which is to protect sensitive information. Respondent notes that the policy appears not in the ELM's "employee conduct" section, but in the "services matter" section, and that it appears just before ELM 667.3, which is entitled "Records, Information, and Associated Processing Systems and Equipment." ELM Section 667.31 states, in pertinent part, that:

> Federal law and sound business practice require compliance with certain rules over the uses and protection of information and information processing resources owned by the Postal Service. These rules apply specifically to those types of Postal Service property emphasized in the definition at 669h. They are provided here for the information of current and former employees and also for use by management as a basis for ensuring compliance and taking disciplinary action, when appropriate. These rules supplement 667.18 and 667.21 referred to earlier in Section 661.2g.

I do not read this provision as clarifying the matter. This rule applies to "the protection of information and information processing resources *owned by* the Postal Service." I read ELM 667.21 as applying far beyond the recording of information or information processing resources that are owned by Respondent.

Respondent cites to *Flagstaff Medical Center* and argues that, similar to the employees in that case, its employees would not reasonably construe ELM 667.21 as restricting protected activity, but as serving these weighty interests. However, I find that *Flagstaff Medical Center* is distinguishable. The rule in that case clearly stated it was in place to protect patient privacy. In contrast, there is no reference in ELM 667.2 to any of the alleged weighty interests Respondent

[17] Respondent presented several witnesses and documentation related to these processes and the stated importance of maintaining confidentiality. While I do not discredit this evidence, the fact remains that, regardless of how these policies may serve Respondent's interest in maintaining confidentiality, there is no reference to this interest in the policies, and there is no evidence that employees were reasonably aware that the policies were intended to serve that interest.

[18] Respondent argues that ELM 667.2 does not explicitly restrict protected activity. Respondent asserts that on its face the policy protects management and employees from being secretly recorded; therefore, it promotes, rather than restricts, protected activity, adding that the policy provides for recording conversations if all the parties consent. This, however, ignores that the rule prohibits protected activity that can occur without all of the parties' consent.

contends it is seeking to serve by maintaining this policy.[19] See *Rio All-Suites Hotel & Casino*, supra at slip op. at 5.

Additionally, even if ELM 667.21, or the surrounding sections, indicated that it was intended to protect sensitive information, the policy broadly encompasses all communications related to postal employment, including the same type of protected activity the Board referenced in *Rio All-Suites Hotel & Casino*, *Whole Foods Market Group*, and *T-Mobile USA, Inc*., such as recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or preserving evidence for later use in administrative or judicial forums in employment-related actions. In order words, I find that ELM 667.21 is not narrowly tailored to serve Respondent's alleged weighty interests without also unreasonably restricting employees' ability to engage in Section 7 activities. Nothing in this policy indicates that any protected activity is exempt, and, therefore, on its face, the policy chills Section 7 activity in the absence of a lawfully promulgated rule that draws lines in a nondiscriminatory way explaining which protected conduct is permitted and which is not. Employees confronted with a policy should not have to decide at their own peril what activity is and is not lawfully prohibited. *UPMC*, 362 NLRB No. 191 (2015); *DirectTV*, 359 NLRB No. 54, slip op. at 3 (2013), reaffirmed by properly constituted Board in *DirecTV U.S. DirecTV Holdings, LLC*, 362 NLRB No. 48 (2015).

Moreover, ELM 667.21 also conditions recording communications or listening in on telephone conversations on the individual obtaining the consent of all the parties involved. To the extent that these communications or conversations are with members of management, the employee would need management consent. The Board has held that any rule requiring employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time or in nonwork areas is unlawful. See generally, *Rio All-Suites Hotel & Casino*, supra, slip op. at 4 fn. 10; *Brunswick Corp.*, 282 NLRB 794, 795 (1987); and *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978).

For these reasons, I find that ELM 667.2 and the Alabama District's bulletin board posting of that rule violate Section 8(a)(1) of the Act.

3. *AS 805-5(s)*

AS 805 5-5(s) prohibits the unauthorized use of cameras or other video recording devices in restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, vehicles, or other Postal Service areas. Similar to ELM 667.2, Respondent argues that this policy is necessary to protect sensitive information consistent with Respondent's statutory and regulatory obligations previously identified, as well as its obligation to protect persons and property. Respondent contends that photographs or video recordings in these areas, particularly of the workroom floors, mail-processing, retail counters, and vehicles, could result in the capture and subsequent disclosure of private or sensitive information, such as the cover of a

[19] Nor is there any reference in ELM 667.31.

piece of mail (e.g., name and address), a customer's credit card information used at the retail counter, the location of valuable stock (e.g., stamps or cash), the location of security risks in a particular facility (e.g., alarms, unlocked doors, biohazard equipment), etc., and that information is then used to do harm.

Respondent contends that an employee would reasonably understand this rule as serving the weighty purpose of protecting sensitive information, and not as restricting Section 7 activity, in part because of the context in which the policy appears. Specifically, Respondent notes that Handbook AS-805 is its principal information-security handbook, which has the title "Information Security." Respondent also notes that the title of section 5-5 itself is "Prohibited Uses of Information Resources." In light of this context, Respondent argues that employees would reasonably construe this rule as furthering its weighty interest in protecting against the video capture and disclosure of sensitive information, and not as restricting protected activity.

The Board addressed rules against photography and video recording in *Whole Foods Market Group*. Similar to *Whole Foods*, Respondent's policy, by its language, broadly applies to all photography or video recording that occurs anytime or anywhere, including Section 7 activity. Respondent contends that the policy is limited to specific areas containing sensitive information, but the language of the policy states it applies to those areas *and* all "other Postal Service areas." The phrase "Postal Service area" is not defined, and it reasonably could be interpreted as encompassing all Respondent-controlled property, such as offices, meeting rooms, break rooms, parking lots, and more.

As far as Respondent's assertions that this policy is needed to protect sensitive information, I note there is no reference to this interest in the policy itself. Respondent again cites to *Flagstaff Medical Center*, but, as previously noted, the policy at issue there (as well as the circumstances surrounding its creation) establishes that it was created to protect patient privacy, which the employer had a statutory obligation to protect. Respondent argues that its interest in protecting sensitive information can reasonably be inferred from the title of the AS Handbook ("Information Security") and the title of the section of the Handbook ("Prohibited Uses of Information Resources") in which the policy appears. I do not agree that employees would reasonably infer the policy's purported purpose from these titles. Moreover, even if AS 805-5(s) was intended to protect sensitive information, I find it is not narrowly tailored to serve those interests without also unnecessarily restricting employees' ability to engage in Section 7 activity.

Finally, AS 805-5(s) contains language requiring managerial approval before engaging in photography or video recording. As previously stated, such approval as a precondition to engaging in protected activity on an employee's free time or in nonwork areas is unlawful. See *Rio All-Suites Hotel & Casino*, supra, slip op. at 4 fn. 10.

For these reasons, I find AS 805-5(s) violates Section 8(a)(1) of the Act.

4. *ASM 663.4*

ASM 663.4 requires employer approval of requests "to publish, distribute, display, or reproduce Postal Service trademarks and copyrighted materials such as photographs, stamps, or other images, or . . . to create images of Postal Service structures, employees, operations, or murals or the like." ASM 663.42 requires employer approval before individuals, businesses, media entities, or other entities may be granted access to Postal Service vehicles or Postal Service premises to film or take photographs.

ASM 663.4 would reasonably be understood to limit employees, or a union, from publicizing a dispute with the Respondent by using its logo in its distributed information. This could be an effective means of publicizing a dispute as the Respondent's logo is well known and easily recognized.[20] As for the weighty interests, Respondent outlines intellectual property reasons for its policy, but none of those reasons override employees' right to engage in Section 7 activity. I, therefore, find that the maintenance of this rule violates Section 8(a)(1) of the Act. See *Cy-Far Volunteer Fire Department*, 364 NLRB No. 49 (2016); *Boch Imports, Inc.*, 362 NLRB No. 83, slip op. at 2 (2015); *Pepsi Cola Bottling Co.*, 301 NLRB 1008 (1991).

Similar to AS 805-5(s), ASM 663.42 broadly applies to all photography or filming that occurs anytime and anywhere on Postal Service premises, including Section 7 activity, such as recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or preserving evidence for later use in administrative or judicial forums in employment-related actions. Respondent asserts this policy is needed to protect sensitive information and maintain security, but there is no reference to these interests in the policy itself. Moreover, even if ASM 663.42 was intended to protect sensitive information and maintain security, it is not narrowly tailored to serve those interests without also unnecessarily restricting employees' ability to engage in Section 7 activity. Finally, the policy contains language requiring managerial approval before engaging in photography or filming. As previously stated, such approval as a precondition to engaging in protected activity on an employee's free time or in non-work areas is unlawful. See *Rio All-Suites Hotel & Casino*, supra, slip op. at 4 fn. 10. I, therefore, find that the maintenance of this rule also violates Section 8(a)(1) of the Act.

5. Fort Worth Media Contact Policy

Respondent's Forth Worth District policy prohibits its employees from conducting media interviews or providing information about Postal Service matters without prior clearance or permission. It is well established that employee communications with the news media regarding labor issues are protected under the Act, and rules or policies, such as this, that reasonably

[20] Respondent introduced photos of picketing in which Respondent's logo was used apparently without any adverse consequences, and argued that those situations prove that Respondent has not applied these rules to prohibit protected, concerted or union activity. However, Respondent does not indicate in its rule, as an exception, that employees or unions are permitted to use trademarked or copyrighted material, such as a logo, for protected, concerted activity.

could be construed as restricting those protected activities, without obtaining the employer's approval, violate Section 8(a)(1) of the Act. See *DirecTV U.S. DirecTV Holdings, LLC*, 362 NLRB No. 48 (2015); *Trump Marina Hotel Casino*, 354 NLRB 1027, 1029 (2009), 355 NLRB 585 (2010) (three-member Board), enfd. 435 Fed. Appx. 1 (D.C. Cir. 2011).

2. Did Delgado threaten Freeman with discharge for engaging in protected, concerted or union activities, in violation of Section 8(a)(1) of the Act?

The complaint alleges that on April 10, 2015, supervisor Natalie Delgado (formerly Butler) unlawfully threatened Freeman with termination if he continued to go to the Union or participate in EEO activities, in violation of Section 8(a)(1) of the Act. Section 8(a)(1) of the Act prohibits an employer from threatening an employee with discharge for engaging in protected, concerted and/or union activities. See *Alliance Steel Products*, 340 NLRB 495 (2003); *Smithers Tire*, 308 NLRB 72 (1992); *Southwestern Bell Telephone Co*., 251 NLRB 625, 631-32 (1980).

Whether this statement that Freeman alleges, and Delgado denies, was made requires a credibility resolution. Credibility resolutions may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions.

Based upon my observations of the witnesses' demeanor, I do not credit that Delgado made this alleged threat. Freeman did not strike me as a reliable witness with clear recollection of statements or actions. At times, he appeared to testify generally and based upon his impressions of a conversation, as opposed to what was actually said. At other times, I found him to be less than completely honest, including as to whether he intentionally recorded the May 18 pre-disciplinary meeting. In his Board affidavit, Freeman testified that he intentionally recorded the meeting. But at hearing he said that it was unintentional. When asked to explain, Freeman said he was confused when he gave his affidavit. I do not believe that Freeman was confused. Nor do I believe that he unintentionally recorded the May 18 meeting. Freeman regularly used his cell phone to record while at work to record meetings and, for his personal use, to record music. I find Freeman knew what he was doing and he intentionally recorded this meeting, like he had other meetings, to preserve evidence, which is why he refused Brock's instructions to leave the phone outside of the meeting room. I find Freeman's continued insistence at hearing that he unintentionally recorded the meeting undermines his overall credibility.

Delgado, on the other hand, confidently and credibly denied making the threats at issue. Although she had limited recollection of the events and circumstances of events almost two years ago, I find this is a conversation she would have recalled had it happened. And based on her limited interaction with Freeman, I do not credit that she would have gone out of her way to threaten him so directly about his union or EEO activities.

Finally, as stated above, Freeman testified there was another employee present for this alleged threat (Javar Jennings). Additionally, Freeman testified he reported Delgado's alleged threats to a union representative (Calvin Walker), and the representative then went and talked to Delgado about the statements. Neither individual was called to testify to offer corroboration. Although the Board has held an adverse inference cannot be drawn based upon the failure to call a neutral employee witness, the failure to call a potentially corroborating witness may be considered in deciding credibility and, in certain circumstances, in determining whether a violation has been established. See *Port Printing Ad & Specialties*, 344 NLRB 354, 357 fn. 9 (2005); *C&S Distributors*, 321 NLRB 404 fn. 2 (1996); and *Queen of The Valley Hospital*, 316 NLRB 721 fn. 1 (1995). In this case, I find that General Counsel's failure to call either of these witnesses to corroborate Freeman's version of events further undermines his credibility regarding his alleged exchange with Delgado.

In light of the foregoing, I do not find that Delgado threatened Freeman with discharge if continued to go to the Union or participate in EEO activities, and I, therefore, recommend dismissing this allegation.

3. Did Brock interfere with Freeman's right to engaged in protected, concerted activity by prohibiting Freeman from recording the May 18, 2015 pre-disciplinary meeting, in violation of Section 8(a)(1) of the Act?

The complaint alleges that on May 18, 2015, MDO Bill Brock unlawfully directed Freeman not to record the pre-disciplinary meeting, in violation of Section 8(a)(1) of the Act. There is no dispute that Brock repeatedly instructed Freeman that he was not permitted to record the meeting, and Brock testified that he was relying upon ELM 667.21 in making these statements. As stated above, I find that ELM 667.21 is overbroad and unlawfully infringes on employees' ability to engage in Section 7 activity. In this case, I find that Freeman intentionally recorded the May 18 meeting so as to have evidence of suspected discrimination or retaliation he and others experienced for raising complaints, which, as previously stated, is protected activity.[21] As a result, I find that Brock violated Section 8(a)(1) of the Act when he directed Freeman not to record the May 18 pre-disciplinary meeting.

4. Did Respondent unlawfully discharge Freemen on June 26, 2015, in violation of Section 8(a)(1) of the Act?

The complaint alleges that on June 26, 2015, Respondent unlawfully discharged Freeman because he violated ELM 667.21 by recording the May 18 pre-disciplinary meeting, in violation of Section 8(a)(1) of the Act. As stated above, I find ELM 667.21 to be an unlawfully overbroad rule, and there is no dispute Respondent discharged Freeman on June 26 for violating this rule. The Board has held that discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by: (1)

[21] Employees, including Freeman, had raised complaints about Brown's harassing conduct. Brock was aware of this, and that is why he met with Freeman prior to Brown returning from his suspension to let Freeman know Brown was coming back.

engaging in protected conduct; or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. *Continental Group, Inc.*, 357 NLRB 409, 412 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004). Under this framework, the employer can avoid liability for disciplinary or discharge decisions imposed pursuant to an overbroad rule if the employer can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. The employer bears the burden of asserting this affirmative defense and establishing that the employee's interference with production was the actual reason for the discipline. That burden only can be met when an employer demonstrates that it contemporaneously cited the employee's interference with production as a reason for the discipline, not simply the violation of the overbroad rule. *Flex Frac Logistics, LLC*, 360 NLRB 1004, 1005 fn. 5 (2014).

Based on the evidence, I find that Freeman was engaged in protected conduct, or in conduct that otherwise implicates the concerns underlying Section 7 of the Act, when he recorded the May 18 pre-disciplinary meeting. As stated before, I find Freeman intentionally recorded this meeting because he was concerned about retaliation due to the complaints he had raised, including the complaints he and others had raised with management about Brown and its handling of his harassing behavior. I also find that Freeman recorded the meeting in an attempt to preserve evidence to use in other proceedings, including those arising out of his EEO charges. As stated above, the Board has recognized that recording evidence for this purpose is protected conduct. *Whole Foods Markets Group, Inc.*, supra. I further find that based upon the email and letter Freeman sent the following day, Respondent was aware what Freeman was using the recording to help establish.

As for the affirmative defense, I find that Respondent has failed to prove that Freeman's conduct of recording the May 18 pre-disciplinary meeting actually interfered with his own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline.

Consequently, I find that Respondent violated Section 8(a)(1) of the Act when it discharged Freeman on June 26, 2015 for violating its aforementioned policy against recording.[22]

5. Is deferral to the arbitrator's decision regarding Freeman's discharge appropriate?

Respondent argues that the complaint allegation regarding Freeman's discharge should be deferred to the February 24, 2016 arbitration decision. The General Counsel opposes deferral. In *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board held that it would defer to arbitral decisions in cases in which the proceedings appear to have been fair and regular, all parties agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the

[22] As there is no allegation before, I make no finding regarding the lawfulness of Respondent's May 18, 2015 decision to change Freeman's start time to 3 p.m.

purposes and policies of the Act. Id. at 1082. In *Olin Corp.*, 268 NLRB 573 (1984), the Board held that it would condition deferral on the arbitrator having adequately considered the unfair labor practice issue, which is satisfied if: the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Id. at 574. The Board stated that it will not require an arbitrator's award to be totally consistent with Board precedent, however, deferral will not be found appropriate under the clearly repugnant standard where the arbitration award is "palpably wrong" or "not susceptible to an interpretation consistent with the Act." Id. Under *Spielberg*, supra, and *Olin Corp*., supra, the burden of proof is on the party opposing deferral to the arbitration award. *Airborne Freight Corp*., 343 NLRB 580, 581 (2004).

In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board recently revisited *Olin* and held that the existing postarbitral deferral standard did not adequately balance the protection of employee rights under the Act and the national policy of encouraging arbitration of disputes concerning the application or interpretation of collective-bargaining agreements. The Board found that the *Olin* standard created an excessive risk of deferral when an arbitrator had not adequately considered the issue of the unfair labor practice, or when it was simply impossible to determine whether that issue had been considered by the arbitrator. In *Babcock*, the Board created a new standard for deferring to arbitral decisions in Section 8(a)(3) and (1) cases, finding that postarbitral deferral is appropriate where the arbitration procedures appear to have been fair and regular, the parties agreed to be bound, and the party urging deferral demonstrates that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law "reasonably permits" the arbitral award. Id. slip op. at 5–10. Critically, the Board in *Babcock* announced a significant change in the deferral analysis by placing the burden of proving the substantive requirements for deferral on the party urging deferral. Id. slip op. at 10–11.

The first question is whether the *Babcock* or the *Olin* standard applies. In *Babcock*, the Board held the new postarbitral standard for deferral would be applied prospectively ("in future cases") and not retroactively ("in all pending cases"). Id. slip op. at 13–14. Therefore, if the arbitration hearing occurred on or before December 15, 2014 (the date the Babcock decision issued), *Olin* applies. However, if the collective-bargaining agreement under which the grievances arose was executed after December 15, 2014, *Babcock* applies. The problem, however, is that none of the parties sought to introduce the applicable collective-bargaining agreement into evidence. As such, I cannot determine what standard applies.

However, under both standards, the arbitrator has to be presented with, and must consider, the alleged violations of the Act. In this case, the alleged violations include whether ELM 667.21—the rule for which Respondent discharged Freeman—violated Section 8(a)(1) of the Act by unlawfully restricting Section 7 activity, and whether Freeman was discharged for engaging in protected conduct or conduct that otherwise implicates the concerns underlying Section 7 of the Act. Based upon my review of the arbitrator's decision, I find that the arbitrator did not consider these issues. The arbitrator never considered the lawfulness of the ELM policy,

or the lawfulness of Freeman's conduct. He, instead, limited his inquiry to determining whether Freeman recorded the meeting, without consent of all the parties involved, and then disseminated the recording of that conversation, in violation of ELM 667.21. The arbitrator concluded that Freeman had intentionally recorded and disseminated the recording of the meeting, but reversed the discharge decision because Respondent failed to comply with the technical contractual requirements regarding the involvement of Freeman's direct supervisor in the discharge decision. As a result, I believe that regardless of what standard applies, I cannot defer to arbitrator's decision in this case because the arbitrator failed to consider or address the alleged violations of the Act.[23]

CONCLUSIONS OF LAW

1. The Respondent, United States Postal Service, provides postal service for the United States and operates various facilities throughout the United States. The Board has jurisdiction over Respondent and this matter by virtue of Section 1209 of the Postal Reorganization Act.

2. National Postal Mail Handlers Union, Branch 83, Local 301 is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

3. Respondent has violated Section 8(a)(1) of the Act by the following:

(a) Maintaining an overly broad rule in its Employee and Labor Relations Manual (ELM) 667.21 that prohibits employees from recording, monitoring, or otherwise intercepting the oral or wire communications of any other person through the use of any electronic, mechanical, or other device, and from listening in on telephone conversations, absent consent of all parties involved in the communication.

(b) Maintaining an overly broad rule in its AS Handbook 805-5(s) that prohibits employees from using webcams, cameras, cell phones with cameras or watches with cameras (and other personal imaging devices) in restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, vehicles, or other Postal Service areas, absent approval from the Postal Service vice president or designee.

(c) Maintaining on permanent bulletin boards throughout its Alabama District offices an overly broad rule that prohibits employees from recording, monitoring, or otherwise intercepting the oral or wire communications of any other person through the use of any electronic, mechanical, or other device, and from listening in on telephone conversations, absent consent of all parties involved in the communication.

(d) Maintaining an overly broad rule in its Administrative Support Manual (ASM) 663.4 that requires employees to forward requests from an individual, business, or other

[23] As previously noted, Respondent was permitted to amend its answer at the hearing to argue that the allegations regarding Freeman's discharge should be deferred. However, Respondent, in its post-hearing brief, makes no argument as to why deferral is appropriate; only that the arbitrator's decision not to award backpay to Freeman was appropriate in light of his two refusals to report to work at his new start time. (R. Br. 26–27).

organization to publish, distribute, display, or reproduce Postal Service trademarks and copyrighted materials such as photographs, stamps, or other images, or a request to create images of Postal Structures, employees, operations, or murals or the like; and that requires written permission to film or photograph Postal Service vehicles or Postal Service premises, absent written permission from Postal Service Integration and Planning.

(e) Maintaining throughout the Fort Worth, Texas District an overly broad rule that requires employees to direct media inquiries such as newspaper, radio, television and social media, such as Twitter and Facebook to Southern Area Corporate Communications for approval; and prohibiting employees from conducting media interviews or providing information about Postal Service matters, absent proper clearance and permission from Southern Area Corporate Communications.

(f) Telling employees they cannot record conversations.

(g) Terminating employees for violating the recording policy as outlined in the ELM, 667.21.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as set forth above.

6. I recommend dismissing that portion of the consolidated complaint which alleges that the Respondent violated Section 8(a)(1) of the Act by threatening employees with termination if they went to their union.

REMEDY

Having found that the Respondent has engaged in a certain unfair labor practice, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As I concluded that the identified provisions in the Respondent's policies are unlawful, the recommended order requires that the Respondent revise or rescind the unlawful policies, and advise its employees in writing that the said rules have been so revised and rescinded. Further, the Respondent shall be required to post at all facilities where the policies at issue applied a notice that assures its employees that it will respect their rights under the Act.

Having found that the Respondent violated Section 8(a)(1) by discharging Freeman on June 26, 2015, for recording the May 18, 2015 predisciplinary meeting, I recommend an order requiring that Respondent offer him full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. 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). In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate Freeman for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment

expenses 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. Additionally, I recommend that Respondent be required to compensate Freeman for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 16, 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. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).[24] Finally, I recommend Respondent be ordered to remove from its files any reference to Freeman's unlawful discharge and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

Respondent contends that Freeman should be denied reinstatement and backpay because he refused to report for work at his new assigned start time following the May 18, 2015 pre-disciplinary meeting, and he again refused to report for work at his assigned start time following the February 24, 2016 arbitration award. I recommend that the Board allow Respondent to establish in compliance whether Freeman should not be reinstated and/or that backpay should be tolled based upon his refusal to report for work. See *Berkshire Farm Center*, 333 NLRB 367, 367 (2001). During compliance Respondent must establish that Freeman engaged in misconduct for which the Respondent would have lawfully discharged any employee. *Hawaii Tribune Herald*, 356 NLRB 661 (2011) (clarifying standard under which Board will assess whether employee's post-discharge misconduct bars reinstatement or tolls backpay), enfd. sub nom. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

Respondent, United States Postal Service,its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad rule in its Employee and Labor Relations Manual (ELM) 667.21 that prohibits employees from recording, monitoring, or otherwise intercepting the oral or wire communications of any other person through the use of any electronic, mechanical, or other device, and from listening in on telephone conversations, absent consent of all parties involved in the communication.

[24] The General Counsel argues Freeman is entitled to consequential damages. I cannot order Respondent to pay consequential damages for costs Freeman may have incurred as a result of Respondent's unfair labor practices. As the Board has recognized, it would require a change in Board law for me to award consequential damages. See, e.g., *Guy Brewer 43 Inc.*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016). Since I must follow existing Board law, and current law does not authorize me to award consequential damages, the General Counsel must direct its request to the Board.

[25] 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.

(b) Maintaining an overly broad rule in its AS Handbook 805-5(s) that prohibits employees from using webcams, cameras, cell phones with cameras or watches with cameras (and other personal imaging devices) in restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, vehicles, or other Postal Service areas, absent approval from the Postal Service vice president or designee.

(c) Maintaining on permanent bulletin boards throughout its Alabama District offices an overly broad rule that prohibits employees from recording, monitoring, or otherwise intercepting the oral or wire communications of any other person through the use of any electronic, mechanical, or other device, and from listening in on telephone conversations, absent consent of all parties involved in the communication.

(d) Maintaining an overly broad rule in its Administrative Support Manual (ASM) 663.4 that requires employees to forward requests from an individual, business, or other organization to publish, distribute, display, or reproduce Postal Service trademarks and copyrighted materials such as photographs, stamps, or other images, or a request to create images of Postal Structures, employees, operations, or murals or the like and requires written permission to film or photograph Postal Service vehicles or Postal Service premises, absent written permission from Postal Service Integration and Planning.

(e) Maintaining throughout the Fort Worth, Texas District an overly broad rule that requires employees to direct media inquiries such as newspaper, radio, television and social media, such as Twitter and Facebook to Southern Area Corporate Communications for approval; and prohibiting employees from conducting media interviews or providing information about Postal Service matters, absent proper clearance and permission from Southern Area Corporate Communications.

(f) Telling employees they cannot record conversations.

(g) Terminating employees for violating the recording policy as outlined in the ELM, 667.21.

(h) 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 from the date of the Board's Order,[26] rescind its recording policy maintained in the ELM, 667.2, Interception of Oral or Wire Communications by Postal Employees, rescind AS 805-5(s) (personal imaging devices) maintained in the Postal Service handbook, rescind and remove from our bulletin boards throughout the Alabama District offices postings memorializing ELM 667.2, rescind Administrative Support Manual (ASM) policies ASM, Sections 663.4, 663.42, and 663.421 requiring Postal employees to get written permission to publish, distribute, display, or reproduce Postal Service trademarks and copyrighted materials, and requiring Postal employees to seek written permission to film or photograph at postal facilities, rescind the Fort Worth, Texas District policy requiring employees to direct media

[26] 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."

inquiries to Southern Area Corporate Communications and requiring employees to have proper clearance and permission before conducting media interviews, furnish all employees with inserts for the current ELM, Handbook AS, and ASM that (1) advises that the unlawful rules have been rescinded, or (2) provide the language of the lawful rules; or publish and distribute a revised ELM, Handbook AS, and ASM that (1) does not contain the unlawful rules, or (2) provide the language of the lawful rules, offer Bruce Edward Freeman Jr. reinstatement to his former job, remove from all references to his June 26, 2015 discharge from our files, and notify him in writing that this has been done, and that the discharge will not be used against him in any way. Make Bruce Edward Freeman Jr. whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

(b) Within 14 days after service by the Region, post at its facilities nation-wide copies of the attached notice marked Appendix A. Copies of the notice, on forms provided by the Regional Director for Region 16 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, postal-vision, 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 closed certain 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 January 1, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director 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., MAY 19, 2017.

ANDREW S. GOLLIN
ADMINISTRATIVE LAW JUDGE

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT
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 do anything to prevent you from exercising the above rights.

WE WILL NOT maintain an overly broad rule in our Employee and Labor Relations Manual (ELM) prohibiting employees from recording, monitoring, or otherwise intercepting the oral or wire communications of any other person through the use of any electronic, mechanical, or other device, and from listening in on telephone conversations, absent consent of all parties involved in the communication.

WE WILL NOT maintain an overly broad rule in our Handbook AS-805 Information Security prohibiting employees from using webcams, cameras, cell phones with cameras or watches with cameras (and other personal imaging devices) in restrooms, locker rooms, retail counter areas, mail processing areas, workroom floors, vehicles, or other Postal Service areas, absent approval from the Postal Service vice president or designee.

WE WILL NOT maintain on our permanent bulletin boards throughout our Alabama District offices an overly broad rule prohibiting employees from recording, monitoring, or otherwise intercepting the oral or wire communications of any other person through the use of any electronic, mechanical, or other device, and from listening in on telephone conversations, absent consent of all parties involved in the communication.

WE WILL NOT maintain an overly broad rule in our Administrative Support Manual (ASM) that requires employees to forward requests from an individual, business, or other organization to publish, distribute, display, or reproduce Postal Service trademarks and copyrighted materials such as photographs, stamps, or other images, or a request to create images of Postal Structures, employees, operations, or murals or the like and requires written permission to film or photograph Postal Service vehicles or Postal Service premises, absent written permission from Postal Service Integration and Planning.

WE WILL NOT maintain throughout our Fort Worth, Texas District an overly broad rule requiring employees to direct to Southern Area Corporate Communications media inquiries such as newspaper, radio, television and social media, such as Twitter and Facebook and prohibiting employees from conducting media interviews or providing information about Postal Service matters, absent proper clearance and permission from Southern Area Corporate Communications.

WE WILL NOT tell you that you cannot record conversations.

WE WILL NOT terminate you for violating an unlawful rule prohibiting our recording.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind our recording policy maintained in the ELM, 667.2, Interception of Oral or Wire Communications by Postal Employees.

WE WILL rescind AS 805-5(s) (personal imaging devices) maintained in the Postal Service handbook.

WE WILL rescind and remove from our bulletin boards throughout the Alabama District offices postings memorializing 667.2

WE WILL rescind Administrative Support Manual (ASM) policies ASM, sections 663.4, 663.42, and 663.421 requiring Postal employees to get written permission to publish, distribute, display, or reproduce Postal Service trademarks and copyrighted materials; and requiring Postal employees to obtain written permission to film or photograph Postal Service vehicles or Postal Service premises.

WE WILL rescind our Fort Worth, Texas District policy requiring employees to direct media inquiries to Southern Area Corporate Communications and requiring employees to have proper clearance and permission before conducting media interviews.

WE WILL furnish all employees with inserts for the current ELM, Handbook AS, and ASM that (1) advises that the unlawful rules have been rescinded, or (2) provide the language of the lawful rules; or WE WILL publish and distribute a revised ELM, Handbook AS, and ASM that (1) does not contain the unlawful rules, or (2) provide the language of the lawful rules.

WE WILL make Bruce Edward Freeman, Jr. whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL offer Bruce Edward Freeman, Jr. reinstatement to his former job and WE WILL remove from our files all references to his June 26, 2015 discharge, and WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

UNITED STATES POSTAL SERVICE
(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.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/18–CA–142795 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.

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, (817) 978-2941.