NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Cott Beverages Inc.[1] ***and*** **Joseph Kelly.** Case 16–CA–181144

May 20, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On May 21, 2019, the National Labor Relations Board issued an Order Remanding in light of the issuance of the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017), while this case was pending before the Board. Specifically, the Board remanded allegations concerning certain facially neutral work rules, with instructions to the judge to determine whether the rules were unlawful under *Boeing.*[2] On October 7, 2019, Administrative Law Judge Paul Bogas issued the attached supplemental decision, and on October 15, 2019, he issued an Errata. The Respondent and the General Counsel filed exceptions and supporting briefs.[3]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions only to the extent consistent with this Supplemental Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining the rules at issue, which prohibit employees from possessing cell phones on the manufacturing floor or at employees' workstations in the Respondent's San Antonio facility. For the reasons discussed below, we reverse.

I. BACKGROUND

The Respondent is a beverage manufacturing company that operates 15 facilities nationwide, including one in San Antonio, Texas. It produces and packages carbonated soft drinks, juices, and purified water. The Respondent's San Antonio production and warehouse employees are covered under corporate-wide rules as well as rules specific to the San Antonio facility. Several of the Respondent's corporate-wide rules are set forth in its Good Manufacturing Practices document. That document includes a CLEANLINESS section, which states:

> 4. All jewelry, including earrings, body piercing such as tongue, cheek, eyebrows, and nose, necklaces etc. and other objects that might fall into the product, equipment, or containers must be removed. (Stoneless wedding bands and Medical Emergency I.D. necklaces are allowed in the processing, batching and production areas.) (Medical Alert Bracelets are not permitted.) Medical emergency I.D. needs, must be reported to HR.
>
> 5. Items are not to be kept in shirt pockets or in any location above the waist that would allow them to fall into the product, food contact surface, or food packaging materials. No personal cell phones are permitted on the manufacturing floor except for those which are company issued or approved. Cellular communication devices may be maintained on the person for management and leadership roles. Radios and company provided communication devices are to be used as the primary form of communication in the manufacturing area. Clothing and personal belongings, such as cigarettes, purses, newspapers, magazines, medications, and personal cell phones are not to be kept at the work station. These items are to be stored in lockers or in your personal vehicle. No personal portable electronic equipment i.e. MP3 players, IPODS, pocket pagers, portable games etc. are allowed in manufacturing, processing, or warehousing areas.

Similarly, the Good Manufacturing Practices document specific to the Respondent's San Antonio facility includes the following:

> The practices that follow apply to all production and warehouse areas (the "facility")
>
> . . . .
>
> PERSONAL BELONGINGS:
>
> Personal items (items not directly related to production processes or job requirements) are not allowed in work areas. These include, but are not limited to: clothing, cell phones, MP3 players, gaming devices, cigarettes, purses, magazines, medications, newspapers, etc. These

---

[1] Cott Beverages Inc. was sold after this case was tried and exceptions to the judge's initial decision were submitted. Refresco Beverages US Inc. is the new owner.

[2] The Board severed these allegations in a Decision, Order, and Notice to Show Cause reported at 367 NLRB No. 97 (2019), and additionally found that the Respondent committed other unfair labor practices. Further, by order dated October 4, 2019, the Board denied the Respondent's request for permission to appeal the judge's decision to retain the case on remand.

[3] The General Counsel now takes the position that the challenged rules are lawful.

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

> may be kept in an associate's locker and may be used during break periods in designated areas.

The San Antonio facility's Good Manufacturing Practices also prohibit, in work areas, jewelry and all other items either worn above the waist or not secured below the waist.

II. ANALYSIS

In *Boeing*, the Board set out a new standard for determining whether a facially neutral work rule, reasonably interpreted, would unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.[5] The Board overruled the "reasonably construe" prong delineated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which held that a facially neutral work rule would be found unlawful if employees would reasonably construe it to prohibit Section 7 activity. Id. at 647. Instead, the Board in *Boeing* held that,

> when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule.

Boeing, supra, slip op. at 3 (emphasis in original).

In conducting this evaluation, the Board will strike the proper balance between the employer's asserted business justifications for the policy against the extent to which the policy interferes with employee rights under the Act, viewing the rule or policy from the employees' perspective. Id. Ultimately, the Board places work rules into one of three categories:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .
>
> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip op. at 3–4 (emphasis in original).[6] However, it is clear that these categories "represent a classification of *results* from the Board's application of the new test" and "are not part of the test itself." Id., slip op. at 4 (emphasis in original).

Under this classification scheme, if the General Counsel meets the initial burden of establishing that a reasonable employee would interpret a rule as potentially interfering with the exercise of Section 7 rights, the Board will then balance that potential interference against the employer's legitimate justifications for the rule. *LA Specialty*, supra, slip op. at 3. When the balance favors the employer's interests, the rule at issue will be lawful and will fit within *Boeing* Category 1(b). When the potential interference with Section 7 rights outweighs any possible employer justifications, the rule at issue will be unlawful and fit within *Boeing* Category 3. Finally, in some instances, "it will not be possible to draw any broad conclusions about the legality of a particular rule because the context of the rule and the competing rights and interests involved are specific to that rule and that employer. These rules will fit within *Boeing* Category 2." Id.

The Respondent contends that its Good Manufacturing Practices are necessary to avoid contamination of the Respondent's beverage production processes and for the safety of its employees. Its policies were developed in response to U.S. Food and Drug Administration (FDA) requirements, pursuant to the Food, Drug, and Cosmetic Act (FDCA), that companies establish and follow practices to minimize hazards inherent in food production.[7] The Respondent contends that the prohibition of personal items from its production area minimizes the risk of items coming loose and contaminating the beverages it produces and that the application of its rule to the warehouse is necessary because warehouse employees operate five-to-six–ton forklifts in a high-traffic environment, and the distractions associated with cell phones create a safety risk.

[5] The reasonable interpretation of a rule is based upon the perspective of an objectively reasonable employee who is aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the Act. *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019) (internal quotations omitted).

[6] In *LA Specialty,* the Board re-designated the subdivisions of *Boeing* Category 1 as (a) and (b). 368 NLRB No. 93, slip op. at 2–3.

[7] The FDCA requires that manufacturers "evaluate the hazards that could affect food manufactured, processed, packed, or held" by its facility and to "identify and implement preventive controls to significantly minimize or prevent the occurrence of such hazards." 21 U.S.C.A. § 350g.

Employees also drive forklifts in and out of the production area.

Citing *Whole Foods Market Group, Inc.*,[8] the judge found that the rules prohibiting cell phones were unlawfully overbroad because they infringed on employees' Section 7 rights to take photographs, record audio and video in the workplace, and make Section 7–protected calls from work areas.[9] Further, the judge rejected the Respondent's justifications for the rules, finding that the Respondent could have promulgated narrower rules that would satisfy its needs without infringing Section 7 rights, such as by permitting cell phones to be worn below the waist where they would be less likely to fall into beverage containers. The judge recognized that, in *Boeing*, the Board found that rules prohibiting recording in the workplace would generally be categorized as lawful Category 1 rules. However, he found that the rules at issue here were distinguishable because they broadly prohibit even the possession of cell phones in work areas and because the employer's justification for the rule in *Boeing* implicated national security and threats of terrorism, unlike the Respondent's justification for the rules here.[10]

The Respondent and General Counsel each filed exceptions to the judge's decision, arguing that the judge erred in finding that the rules were unlawful under *Boeing*. As explained below, we find merit in these exceptions.

We agree with the judge that the Respondent's corporate-wide and San Antonio Good Manufacturing Practices potentially infringe on Section 7 rights by restricting employees' ability to use their phones not only to make audio or video recordings but also to communicate with each other about workplace issues or to take photographs of working conditions. Importantly, however, the Respondent's prohibitions are limited to working areas, specifically the manufacturing floor and the warehouse, as opposed to nonworking areas. Indeed, nothing in the rules restricts employees from retrieving their phones from their lockers and using them on their own time when away from their workstations. In light of the above, we find that the rules' potential infringement on Section 7 rights is relatively slight.

Turning to the Respondent's justification for the rules, we find that the broad prohibition of personal items including cell phones from work areas is a reasonable, lawful effort to ensure the integrity of the Respondent's beverage production process and to satisfy FDA requirements for food-production facilities. We also agree with the Respondent that, because of the unique distractions cell phones pose, a blanket prohibition on usage in work areas is a reasonable restriction in order to reduce the risks of product contamination, slowed response times, and on-the-job accidents. Indeed, safety is a particular concern for warehouse employees who operate forklifts in a fast-paced environment and transport product from the production areas.[11] Accord *Argos USA LLC d/b/a Argos Ready Mix, LLC,* 369 NLRB No. 26 (2020) (finding that employer lawfully maintained a rule prohibiting drivers from having cell phones in the cabs of commercial vehicles in light of the potential hazards cell phone usage could pose to drivers of such vehicles). Finally, we reject the judge's rationale that the rules are unlawful because the Respondent could have drafted the rules more narrowly. As set forth above, having found that the rules have some, albeit slight, impact on Section 7 rights, the pertinent question becomes whether that impact (or overbreadth) is outweighed by the Respondent's business justifications for the rule, not whether the Respondent could have drafted a narrower rule. See *Boeing*, supra, slip op. at 9 fn. 41 (explaining that employers need not anticipate and exempt every conceivable Section 7 activity when drafting neutral work rules).[12]

For the above reasons, we find that the Respondent's legitimate business interests outweigh the relatively slight risk that the Good Manufacturing Practices will interfere with employees' right to engage in activity protected by the Act.[13]

---

[8] 363 NLRB No. 87 (2015) (discussing employees' Sec. 7 rights to record in the workplace to document hazardous working conditions and unfair labor practices), affd. 691 Fed. Appx. 49 (2d Cir. 2017).

[9] The judge also noted that evidence of the Respondent's unlawful interrogation of the Charging Party, which is not before us in this proceeding, was obtained by an employee recording with his personal device; however, that recording was made in an office and not at the employee's workstation.

[10] The Board in *Boeing* acknowledged that the recording ban there potentially infringed Sec. 7 rights, but held: "Although the [national security–related] justifications associated with Boeing's no-camera rule are especially compelling, we believe that no-camera rules, in general, fall into Category 1, types of rules that the Board will find lawful . . . ." *Boeing,* supra, slip op. at 17.

[11] The judge's opinion that the Respondent should permit cell phones to be secured below the waist ignores the particular distractions cell phones pose and would potentially compromise the Respondent's legitimate efforts to maintain good manufacturing and control practices in compliance with the FDCA.

[12] Thus, the judge's discrediting of Corporate Senior Director of Quality Patrick Rank's testimony concerning whether the Respondent could have addressed its cell phone concerns with a narrower policy is immaterial to our post-*Boeing* analysis.

[13] Although we find merit in the exceptions, we disagree with the Respondent's and the General Counsel's contentions that the Respondent's rules should be designated as Category 1(a) rules. Inherent in the Respondent's restriction on the possession of cell phones in work areas is the prohibition on using those phones for photographing or recording concerted activities and documenting working conditions, as well as the prohibition on making calls from work areas. Although the specific reference to cell phones is contained in a long list of personal items that cannot be carried in work areas, that does not change the effect of the

Accordingly, we reverse the judge and find the Respondent's cell-phone policies are lawful.

ORDER

The allegations that the Respondent unlawfully maintained rules prohibiting employees from having cell phones on the manufacturing floor or at their workstations are dismissed.

Dated, Washington, D.C. May 20, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Megan McCormick, Esq. and *Eva Shih, Esq.,* for the General Counsel.

John J. Toner, Esq. and *Joseph Damato, Esq. (Seyfarth Shaw LLP),* of Washington, D.C. and *Brian Stolzenbach, Esq.,* and *Karla E. Sanchez, Esq. (Seyfarth Shaw LLP)* of Chicago, Illinois, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. On September 11, 2017, I issued a decision finding, inter alia, that Cott Beverages Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act or NLRA) by maintaining rules that prohibited employees from having personal cell phones on the manufacturing floor or at their workstations. Both the Respondent and the General Counsel excepted to elements of my decision. While those exceptions were pending before the National Labor Relations Board (Board or NLRB), the Board issued its decision in *The Boeing Company*, 365 NLRB No. 154 (2017), reconsideration denied 366 NLRB No. 128 (2018). In that decision, the Board modified the standards for determining when an employer's work rules violate Section 8(a)(1). On May 21, 2019, the Board issued an Order remanding the instant case to me "for the purpose of reopening the record, if necessary, and preparation of a supplemental decision addressing the complaint allegations affected by *Boeing* setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order." The only issues remaining in this proceeding are those to which the *Boeing* decision is relevant—specifically, those pertaining to whether the Respondent violated Section 8(a)(1) by maintaining overly broad rules that prohibit employees from possessing personal cell phones on the manufacturing floor or at their workstations.[1]

After the remand, the General Counsel and the Respondent both submitted statements taking the position that the record should not be reopened, and the Charging Party, John Kelly, did not submit a statement. I did not find a basis to reject the views of the General Counsel and the Respondent that additional evidence was not necessary, and I provided the parties with the opportunity to submit briefs. The General Counsel and the Respondent both filed briefs in which they take the position that the Respondent's prohibitions on employee possession of personal cell phones do not violate the Act under the standards set forth in the *Boeing* decision. Charging Party Kelly (an individual non-lawyer who is not represented by legal counsel) did not submit a brief; however, in a June 11, 2019, submission, Kelly essentially argued that the rules were unlawful under *Boeing* because cell phone recordings are extremely valuable in controversies between employees and employers and the Respondent had not shown that the rules' impact on such use was outweighed by evidence of a risk of contamination or injury.[2]

rule, which potentially infringes on some Sec. 7 activity. Because we have found that the potential adverse impact on protected rights is outweighed by the Respondent's justifications, we find that the rules at issue here should be placed in *Boeing* Category 1(b).

In *Argos*, supra, we placed in *Boeing* Category 1(a) a rule prohibiting drivers of the respondent's ready-mix trucks from having a cell phone in the cab of the truck. However, *Argos* differs from this case in material ways. In that case, the ready-mix trucks are equipped with two-way radios and disposable cameras, and drivers may take breaks while they are away from the facility. Thus, we found that nothing in the cell phone policy "would indicate to an employee that they are prohibited from discussing, taking photos, or recording their terms and conditions of employment while away from the facility." Id., slip op. at 4. Moreover, and importantly, the policy in *Argos* emphasized repeatedly that the purpose of the policy was to ensure the safety of the drivers and the general public. Based on these considerations, we concluded that the drivers, viewing the policy in the context of the everydayness of their jobs, would not interpret it to interfere with the exercise of employee rights under the Act. Id. By contrast, the purpose of the rules here may not be obvious to the Respondent's employees, given that employees may possess company-issued or -approved devices but not personal devices.

[1] The other allegations in the Complaint concerned interrogations and, as of June 3, 2019, the Respondent had completed compliance with the remedy regarding the violations I found in that regard.

[2] Kelly's June 11 submission was an opposition to the General Counsel's motion of May 31, 2019. That motion, which the Respondent supported, asked that I remand this proceeding to the Director of Region 16 for further action. In the Motion, the General Counsel took the position that the Respondent's rules are lawful under the *Boeing* standard and it appeared that the further action the General Counsel anticipated was dismissal of the allegations relating to those rules. I found merit in Kelly's opposition to that course of action and, on June 25, 2019, I denied the General Counsel's motion. On August 9, 2019, the Respondent filed a motion with the Board requesting a special appeal and asking the Board to stay all further proceedings before me in this case and dismiss the allegations. On October 4, 2019, the Board denied the Respondent's August 9 motion.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a beverage manufacturing facility in San Antonio, Texas, where it annually receives products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Texas. The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

The Respondent is a beverage manufacturing company that operates 15 facilities, including one in San Antonio, Texas. It produces and packages carbonated soft drinks, juices, and purified water. The Respondent employs 190 individuals at its San Antonio facility, of whom about 50 work in production and 15 in the warehouse. The Respondent's employees are not represented by a labor organization.

There are four production lines at the San Antonio facility, each of which produces beverages or containers and/or fills containers with beverages. The lines operate continuously during the shifts when they are in operation, with four to six employees on each line during a given shift. Transcript at Page(s) (Tr.) 139. Employees assigned to the production lines do not have scheduled breaks, but they do have unscheduled breaks, including 30 minutes for lunch. Each production line has a "line lead" employee who oversees the operation of the line. When an employee working on the line takes a break it is generally the line lead who relieves that employee and steps in to perform the relieved employee's duties. The facility also has a warehouse area where five employees work on any given shift. Forklifts are used in both the production and the warehouse areas at the facility to move materials and product.

Darren Heinsohn is the process leader for one of the four production lines at the San Antonio facility. In that capacity, he oversees the line lead employee as well as the regular employees on that production line. Heinsohn reports to Shane Owens who is the facility's production manager.

2. Prohibition on Possession of Personal Cell Phones

In the decision that I issued prior to the Board's decision in *Boeing*, I found that the Respondent's rules prohibiting employees from possessing their personal cell phones while in the facility's production and warehousing areas or at their workstations and requiring them to store such devices in employee lockers unlawfully interfered with employees' right to engage in protected concerted activity. There are two rules at issue—one a corporate-wide rule and one promulgated for the San Antonio facility. The "cleanliness" section of the corporate rule, which has been in effect since approximately March 25, 2014, states:

> 4. All jewelry, including earrings, body piercing such as tongue, cheek, eyebrows, and nose, necklaces etc. and other objects that might fall into the product, equipment, or containers must be removed. (Stoneless wedding bands and Medical Emergency I.D. necklaces are allowed in the processing, batching and production areas.) (Medical Alert Bracelets are not permitted.) Medical emergency I.D. needs, must be reported to HR.
>
> 5. Items are not to be kept in shirt pockets or in any location above the waist that would allow them to fall into the product, food contact surface, or food packaging materials. No personal cell phones are permitted on the manufacturing floor except for those which are company issued or approved. Cellular communication devices may be maintained on the person for management and leadership roles. Radios and company provided communication devices are to be used as the primary form of communication in the manufacturing area. Clothing and personal belongings, such as cigarettes, purses, newspapers, magazines, medications, and personal cell phones are not to be kept at the work station. These items are to be stored in lockers or in your personal vehicle. No personal portable electronic equipment i.e. MP3 players, IPODS, pocket pagers, portable games etc. are allowed in manufacturing, processing, or warehousing areas.

General Counsel Exhibit Number (GC Exh.) 3.

At the San Antonio facility the Respondent imposed the following prohibition, which has been in effect since approximately April 2015, and which is in addition to the Corporate Policy set forth above:

> PERSONAL BELONGINGS:
>
> Personal items (items not directly related to production processes or job requirements) are not allowed in work areas. These include, but are not limited to: clothing, cell phones, MP3 players, gaming devices, cigarettes, purses, magazines, medications, newspapers, etc. These may be kept in an associate's locker and may be used during break periods in designated areas.
>
> JEWELRY:
>
> All jewelry, including earrings, body piercing such as tongue, cheek, eyebrows, and nose, necklaces etc. and other objects that might fall into the product, equipment or containers must be removed (plain wedding bands and Medical Emergency I.D. necklaces are allowed in the processing, batching and production areas).
>
> * * *
>
> NO ITEMS ABOVE THE WAIST:
>
> No items may be carried in shirt pockets (i.e. pens, pencil[s], combs, etc.) All loose items must be carried in pants pockets or otherwise secured below the waist; such items should be minimized. Plants providing uniforms are encouraged to purchase shirts with no pockets, to help enforce this policy.

GC Exh. 4.

The only witness who the Respondent called to testify about the justifications for the challenged rules was Patrick Rank – the Respondent's corporate senior director of quality from October 2013 to May 2017. Rank headed a team that developed the policies that contain the prohibitions set forth above. He stated that there were two basic reasons for the Respondent's promulgation of the prohibitions on personal cell phones. The first was to

protect against contamination. Specifically, he testified that "hav[ing] a cell phone or something above the belt would allow a foreign material to be dropped in a container" used in the production of food. Tr. 146. He suggested that such foreign material could include the cell phone itself. Tr. 147–148. Rank did not testify, however, that having a cell phone secured below the belt would "allow a foreign material to be dropped" into the food. Rank testified that all the Respondent's plants are regulated by the U.S. Food and Drug Administration (FDA) pursuant to the Food, Drug, and Cosmetic Act (FDCA). See 21 U.S.C. Section 301, et seq. and 21 C.P.R. Section 110.5, et seq., which set forth certain measures to prevent contamination.

Rank testified that the second reason for the prohibition was that the Respondent was concerned about the safety of its employees. Tr. 146. He stated that employees' use of cell phones near the production lines could distract employees and slow their reaction to problems or cause them to injure themselves. The use of the cell phones in the warehouse, he stated, might distract employees and cause someone, or something, to be hit by a forklift.[3] Neither Rank's testimony, nor the record as a whole, identifies any actual incidents when an employee's possession of a cell phone or similar device resulted either in contamination of product or in injury to person or property.

Rank was asked by counsel for the Respondent whether it would be possible to address concerns about cell phones in a less restrictive manner—for example, by allowing employees to possess cell phones but restricting how they carried and used them. Rank's testimony till that point had been largely fluid, but in response to this softball question from sympathetic counsel his speech became hesitant and stammering. His uncertainty was apparent to me from his demeanor, but it is evident even from a simple review of the transcript of his answer:

> No. No. I don't—I think if you—if you try to implement a policy such as the one you just recommended or not recommended, but just suggested, it is one that—I don't see how a—I don't see how it could be managed. It is not a policy that—you don't—you would then be in a position to have to manage the—every single minute of what an associate was doing with that particular device, so I don't think the policy in itself would be manageable.

Tr. 150–151. Not only was Rank's response on this subject strained and uncertain, but it was also self-serving and conclusory. I find that this response was not credible based on Rank's demeanor, the testimony itself, and the record as a whole.

Rank stated that while the contamination and safety concerns discussed above justified prohibiting employees from even possessing cell phones in the production and warehouse areas, the Respondent permitted line lead employees to possess *and use* cell phones in those same areas. He stated that the Respondent did not apply the prohibition to lead employees and managers because those individuals "have a responsibility to communicate . . . to the outside world or to the management" about occurrences at the manufacturing facility. Rank also expressed the view that because supervisors are "not tied to a piece of equipment" Tr. 149, the Respondent did not, by allowing those individuals to possess and use cell phones, create the same risk that it would by allowing regular employees to exercise that freedom. It appears, however, that Rank, who was a corporate-level official, did not have an accurate understanding of the role that line lead employees played in the production area at the San Antonio facility. In particular, the evidence showed that, at the San Antonio facility, line lead employees were generally the ones who took over regular employees' production line duties during breaks. Tr. 63,177. Rank appears to have been unaware of this insofar as he denied that lead employees ever fill-in for other employees during breaks, and asserted that production lines are, instead, "staffed with" "relief operators" who fill-in during breaks. Tr. 153–154.[4]

As set-forth above, the corporate policy relaxes the prohibition slightly by stating that it applies to cell phones "except for those which are company issued or approved." Neither Rank, nor any other witness, stated whether, or on what basis, the Respondent believed that an employee's possession of a company approved or issued cell phone would not pose the same risks of contamination and injury that were posed by an employee's possession of a personal cell phone.

Heinsohn testified that at all times when employees are physically present on the production line they are expected to be working and are considered to be on "working time." Tr. 63. They cannot leave the line for breaks unless they are relieved. Heinsohn also stated that the employees take their breaks in facility break rooms that are not part of the manufacturing floor. Ibid.

3. Ammonia Leak Accident on May 12

Joseph Kelly, the charging party, is a production line employee and a member of the facility's safety committee. On May 12, 2016, there was an accident at the facility involving an ammonia leak. Kelly smelled the ammonia entering his work area

---

[3] The Respondent's counsel asked Rank about chemicals used at the Respondent's facilities, and Rank responded that cleaning chemicals used at the Respondent's facilities could be dangerous if used improperly. Rank did not, however, claim that the presence of cell phones increased the risk that cleaning chemicals would be used improperly or that the risk involving cleaning chemicals had anything to do with the prohibitions at issue here.

[4] In its Brief on remand, the Respondent exaggerates the difference in risk presented by allowing all employees on the manufacturing floor to carry cell phones as opposed to just allowing the line leads and management employees to do so. It asserts that "At any given time only about three management individuals are on the manufacturing floor carrying cellular phones, compared to 190 total employees." Brief of the Respondent at Page 12. The evidence shows, however, that only 50 employees work in the Respondent's production operation, Tr. 74, and that "at any given time" at most 16 to 24 of those—four to six on each of four lines—are on-duty on the production lines, Tr. 139. Even that figure may overstate the number of regular employees on the production floor at a given time because not all four lines operate on every shift. Tr. 61. Similarly, the Respondent's suggestion that it only permits three persons to have cell phones on the production floor at any given time is dubious since it takes account of only three line leads, not of the other supervisors and managers—e.g., Heinsohn (a process leader), Ewing Bond (a process leader), and Owens (production manager)—who its policy allows to possess personal cell phones while in the production area. Nor does it account for the fourth line lead who would be present if all four lines were operating.

and responded by, inter alia, using the 911 system to alert public safety officials to the emergency. Due to the danger posed by the leak, employees were evacuated, and the facility was shut down for a period of hours.

III. ANALYSIS

A. Prohibition on Employees Possessing Cell Phones at Work

In *Boeing*, the Board stated that when an employer's facially neutral rule is alleged to interfere with employees' exercise of NLRA rights in violation of Section 8(a)(1), the lawfulness of the rule is evaluated using a balancing test, except when the rule is of a type that the Board has already designated as uniformly lawful (category 1) or uniformly unlawful (category 3). Individualized scrutiny under the balancing test is the appropriate analysis in this case because the Respondent's challenged rules are facially neutral and not among those types that the Board has previously designated as uniformly lawful or unlawful.

Before proceeding to the balancing test, I address the Respondent's argument that in *Boeing* the Board designated the Respondent's prohibitions as the type of "category 1" rules that are uniformly lawful. That is simply not the case. Neither in *Boeing* nor in any other case cited to me by the parties or of which I am aware has the Board designated blanket prohibitions on employee possession of personal cell phones in work areas as either uniformly lawful or uniformly unlawful. In *Boeing* the rule that was at-issue, and which the Board placed in category 1, prohibited employees at "one of the country's most prominent defense contractors" from photographing or videotaping in the workplace. The Respondent seeks to expand the holding in *Boeing* too broadly when it argues that it disposes of the very different rules at-issue in the instant case. The rule approved in *Boeing* did not prevent employees from possessing cell phones, or other camera enabled devices in work areas. To the contrary, the Board specifically observed that the *Boeing* rule expressly provided that "[p]ossession of [camera-enabled devices such as cell phones] *is permitted on all company property*." Slip op. at 17. (Emphasis Added). What Boeing's rule prohibited was only the "use of these devices to capture images or video." The Respondent's rules in the instant case are more draconian, prohibiting employees from even possessing cell phones in work areas and thereby absolutely precluding employees from using cell phones not only to take photographs or video recordings, but also precluding employees from making audio recordings or phone calls as part of NLRA-protected activities. That type of interference with employees' exercise of their NLRA rights was not presented, or considered, in *Boeing.*

In recent years, employees' NLRA activity has not infrequently included using cell phones to make audio recordings. In cases brought to vindicate NLRA rights, disputes of fact often arise regarding what was said at a meeting or during a conversation. When there is an actual audio recording of the disputed statements, those recordings supply important evidence to one attempting to ascertain the truth. The Board has recognized that in many reported cases an audio recording has been key evidence on the question of whether an individual made, or did not make, the allegedly unlawful statements. *Whole Foods,* 363 NLRB No. 87 slip op. at 3 fn. 8 (2016) (collecting cases),[5] enfd. 691 Fed. Appx. 49 (2d. Cir. 2017); *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip at 3–4 (2016), enfd. in relevant part 865 F.3d 265 (5th Cir. 2017); see also *Sullivan, Long & Hagerty,* 303 NLRB 1007, 1013 (1991) (employee engaged in protected activity by carrying a tape recorder to aid in a Department of Labor investigation), enfd. mem. 976 F.2d 743 (11th Cir. 1992). The Board has also recognized that recording is a way that employees exercise their NLRA right to "document[ ] unsafe workplace equipment or hazardous working conditions, . . . [and] inconsistent application of employer rules." *Whole Foods*, supra. Moreover, although the Respondent effectively prohibits employees from making audio recordings of meetings and other conversations, it places no such limitations on doing so itself. Thus, the Respondent's rule creates an asymmetrical evidentiary circumstance where only one side—the employer and its supervisor/managerial personnel—has the ability to create, and retain (or destroy), audio evidence of an alleged unfair labor practice.

While the prior cases referenced above amply demonstrate that employees use cell phones to exercise their NLRA rights, the fact is that one need look no further than the instant case to see that this is so. The determination in this case that management had coercively interrogated Kelly in violation of Section 8(a)(1) was based largely on the evidence provided by a covert recording of the contested conversation.[6] Without it, I might well have accepted the Respondent's more anodyne characterization of the interrogation. In addition, the evidence in this case showed that when there was an ammonia accident at the facility that affected worker safety, charging party Kelly was able to contact public safety officials for help during the emergency.[7] Interference with these types of NLRA activity were not at-issue in *Boeing* and were not addressed by the Board in that case.

Since the Respondent's cell phone rules are not of a type that the Board has designated as either uniformly lawful or unlawful, I turn to the individualized balancing test articulated in *Boeing.*

---

[5] The Board's list included: "*Times-Herald Record*, 334 NLRB 350, 354 (2001) (surreptitious audio recording of meeting at which employer unlawfully threatened employees admissible in Board proceeding), enfd. 27 Fed.Appx. 64 (2d Cir. 2001); *Painting Co*., 330 NLRB 1000, 1003 (2000) (covert recording supported allegation that employer unlawfully threatened to close the company), enfd. 298 F.3d 492 (6th Cir. 2002); *Arrow Flint Electric Co*., 321 NLRB 1208, 1219 (1996) (surreptitious recording was admitted in support of unlawful closure threat and discharge allegations); *Wellstream Corp.*, 313 NLRB 698, 711 (1994) (surreptitious recording admissible in support of allegations that employer unlawfully solicited grievances and threatened employee); *McAllister Bros.,* 278 NLRB 601 fn. 2, 605 fn. 3 (1986) (recording of meeting admitted to show that employer unlawfully engaged in direct dealing), enfd. 819 F.2d 439 (4th Cir. 1987); *Algreco Sportswear Co.,* 271 NLRB 499, 505 (1984) (surreptitious recording admitted to support allegations of unlawful threats); *East Belden Corp.,* 239 NLRB 776, 782 (1978) (surreptitious recording of a meeting admitted to show that employer unlawfully told employees that it did not intend to sign a contract with the union), enfd. 634 F.2d 635 (9th Cir. 1980)."

[6] This issue is no longer in the case, since the Respondent has complied with the order pertaining to the unlawful interrogation.

[7] The record did not show whether Kelly contacted these officials using his personal cell phone. At any rate, possession of a cell phone either did, or would have, facilitated this communication about a safety emergency affecting a group of employees.

Under that balancing test, I first must determine whether the facially neutral rules are ones that the employees would "reasonably interpret[ ]" as "potentially interfer[ing] with the exercise of NLRA rights." If they are, I then am required to evaluate whether the "nature and extent of the potential impact on NLRA rights" outweighs any "legitimate justifications associated with" the rule. *Boeing*, slip op. at 3–4 and 16.

Regarding the first question, I find that employees would reasonably interpret the rule against possession of cell phones as interfering with the exercise of their NLRA rights. Employees exercise NLRA rights when they document unlawful interference with protected union or concerted activity in order to challenge such interference. *Bon Harbor Nursing and Rehabilitation*, 348 NLRB 1062, 1079 (2006) (employee has right to document employer's unlawful removal of union literature from break area). Similarly, employees exercise NLRA rights when they document "unsafe workplace equipment or hazardous working conditions, . . . discussions about terms and conditions of employment, . . . [and] inconsistent application of employer rules." *Whole Foods*, slip op. at 3. As suggested by the charging party's call to public safety officials about the accidental release of ammonia into the air at the facility, employees may use a cell phone not only to document hazardous conditions, but to protect employees from hazards such as chemical accidents, factory fires, and so forth. Even if one assumes that an employee's use of a cell phone to document unfair labor practices or warn of abnormally dangerous conditions is not itself the exercise of NLRA rights, the cases show that in many instances cell phones are the means by which employees are able to exercise NLRA rights. Not only would a reasonable employee interpret the Respondent's challenged rules to interfere with employees' cell phone-enabled NLRA activities, but those rules cannot reasonably be interpreted as not interfering with such activities. Moreover, the rule will certainly chill employees from complaining about unfair labor practices since an employee who has audio documentation of a violation is more likely to risk filing a charge that might provoke the employee than would be an employer who had only his or her word.

The Respondent's challenged prohibitions place a particularly weighty burden on the types of NLRA activity discussed above. The Respondent does not identify any alternative means of engaging in those audio recording activities and phone calls that employees would be expected to have at their disposal without running afoul of the challenged policies. By prohibiting employees from possessing the means to engage in these NLRA-protected activities the Respondent necessarily and completely forecloses that activity. In this regard, the interference represented by the Respondent's rules is more complete than would be the case if the rule simply prohibited employees from making audio recordings or phone calls, since depriving employees of the equipment used for that activity means that employees would not be able to record or make a call even when the need to do so was so compelling that it justified an exception to the prohibition.[8] Moreover, given that the rule does not permit the possession of such equipment in the production and warehouse work areas, the rule necessarily does not differentiate between uses that are protected by the NLRA and those that are unprotected, a circumstance that led the Board to find the prohibitions in *Whole Foods* and *T-Mobile*, unlawfully overbroad. *Whole Foods*, slip op. at 4, *T-Mobile*, slip op. at 4.

The Respondent attempts to minimize the extent to which it is interfering with employees' exercise of NLRA rights by suggesting that the prohibition is limited to working time inasmuch as all employee time at the production line is "working time." This argument fails if for no other reason than that the prohibition encompasses nonworking time. Specifically, the Respondent not only prohibits employees from possessing cell phones in their work areas, but provides that cell phones are to be kept in lockers, except during "break periods *in designated areas*." The Respondent has not "designated" *any* areas where it permits employees to use cell phones while on breaks, and certainly has not shown that such areas include all areas where employees are present in the facility during non-working time. Second, the rule places no discernible limits on the Respondent's discretion to decide what areas, if any, are designated for cell phone use. The Board has held that an employer rule that requires an employee to obtain management's permission before recording for NLRA purposes or engaging in other types of protected activity violates the Act. *Whole Foods*, slip op. at 3; *G4S Secure Solutions (USA), Inc.*, 364 NLRB No. 92, slip op. at 1 (2016), enfd.707 Fed. Appx. 610 (11th Cir. 2017); *General Electric, Co.*, 169 NLRB 1101, 1102 and1104 (1968), enfd. 411 F.2d 750 (9th Cir. 1969). The Respondent's rule limits employees' ability to engage in recording activity to those instances in which the employer has granted permission by designating an area were such activity is allowed. Third, the record shows that not even all the time that employees are in the production area is work-time. Rather employees begin their breaks at the production line when a line lead relieves them. This means that there would be periods of time when employees are on break in the production areas, but prohibited from possessing cell phones. Moreover, the Respondent did not present evidence that the group of employees assigned to the warehouse area are on "work-time" whenever they are in the warehouse or otherwise prohibited from possessing personal cell phones.

Since the Respondent's facially neutral prohibitions on the possession of cell phones would reasonably be interpreted to potentially interfere with employees' exercise of NLRA rights, I turn to the second part of the balancing test—i.e., does that interference outweigh the Respondent's "legitimate justifications" for the cell phone rules. I find that the Respondent's interference with the exercise of NLRA rights does, in this case, outweigh any legitimate justifications for that interference. To support the Respondent's contention that legitimate concerns about food contamination justify its cell phone prohibition, Rank testified that "hav[ing] a cell phone or something above the belt would allow a foreign material to be dropped in a container." Rank's testimony—the only testimony offered by

[8] Both the Supreme Court and the NLRA itself recognize that circumstances sometimes justify employees taking action that would otherwise be prohibited. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962) (employer violated the NLRA when it discharged employees for violating plant rules by ceasing work where the reason the employees did so was that the plant was bitterly cold); see also 29 U.S.C. Section 502 (employees who cease working because of "abnormally dangerous conditions" are protected even where such action would otherwise be an unlawful strike).

the Respondent about its justifications for the cell phone prohibition—suggests that the Respondent could meet concerns about contamination without interfering with employees' exercise of the NLRA rights. Specifically, if the problem is, as Rank testified, the risk posed by an employee keeping a cell phone "*above the belt*," then that concern could be addressed by a restriction that requires employees to keep such devices in pants pockets or otherwise secured below the belt. Indeed, that is exactly what the Respondent's rules do with respect to employees' possession of other personal items—including "pens, pencils, combs"—that would contaminate product if dropped into an open food processing container. Although the Respondent's concerns about food safety could constitute a legitimate justification for a more limited restriction on cell phones (e.g., requiring that they be secured below the waist, or not used while operating equipment) that concern is not a legitimate justification for the much broader prohibition it has imposed. Nor, notably, would concerns about contamination explain why the Respondent extended the prohibition to employees working in the warehouse where beverage production does not take place and there is no reason to believe that contamination from a dropped cell phone is possible.

The Respondent's claim that it believes that possession of cell phones on the production line poses an unacceptable contamination risk is also contradicted by the fact that its rules permit line leads and supervisors to possess, and even use, such devices in those areas. Rank tried to explain this by asserting that line leads do not work on the production line. The record shows that, to the contrary, line leads at the facility regularly work on the production lines doing the same tasks as regular employees. Rank also suggested that concerns about permitting line leads to carry cell phones are outweighed by the countervailing interest in allowing those individuals "to communicate . . . to the outside world or to management." He did not state, however, that he gave any consideration to the fact that employees also have a countervailing interest—i.e., their freedom to engage in NLRA-protected documentation of coercive, unsafe or otherwise problematic activity or conditions in the workplace. The Respondent's argument that its ban is justified by overriding contamination concerns is undercut still further by the fact that the corporate rule prohibits employees from possessing a "personal" cell phone, but allows them to possess cell phones that "are company issued or approved." The Respondent did not present evidence that company-issued or approved cell phones would not pose the same risks that are posed by possession of personal cell phones. However, since the Respondent would be able to repossess a company-issued cell phone at any time, restricting employees to using only company phones minimizes the risk that a cell phone would end up providing evidence of alleged unfair labor practices or safety violations at the facility.

In weighing the Respondent's contamination justification, I also considered that the Respondent did not identify a single instance when a cell phone had ever caused contamination at any of its 15 production facilities. Nor did the Respondent present evidence showing that such contamination, even if it ever were to occur, could go undetected or would be difficult to remedy.

In considering how much weight to give to the Respondent's contamination justification, I considered the Respondent's argument that its facilities are subject to regulatory requirements imposed by the FDA. See 21 CFR Section 110 (2016). This argument would be more persuasive if the Respondent had shown that the prohibition on cell phones was mentioned by, or necessary to comply with, requirements imposed by the FDA.[9] However, the regulations identified by the Respondent, while requiring regulated entities to implement controls to protect food safety, make no mention of cell phones or electronic devices and do not state that those items are to be banned from either production or warehouse areas. Indeed, it is clear the Respondent's argument that the FDA bans the possession of cell phones on the manufacturing floor does not even convince the Respondent since, as discussed earlier, the Respondent allows line leads and managers to possess cell phones and allows any employee to possess a cell phone as long as it is "company issued or approved."[10]

Based on the above, and the record as whole, I find that the Respondent does not have a "legitimate" food contamination justification for its rules. That is not to say that it does not have an

[9] See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 143–144 (2002) ("'[T]he Board is obliged to take into account other "equally important Congressional objectives"'" when considering action that would "potentially trench upon federal statutes and policies unrelated to the NLRA.") and *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.").

[10] To support its assertion that the *Boeing* balancing test weighs in its favor, the Respondent cites *Campbell Soup Co.*, 159 NLRB 74 (1966), enfd. 380 F.2d 372 (5th Cir. 1967). See Brief of Respondent at Page 21. In that case the Board approved of a rule that was enforced to prohibit an employee from wearing a pro-union hat and button in a factory where soup was being manufactured and canned. I have some doubts about the precedential value of the result in that case given that it was decided 50 years before the Board adopted the *Boeing* balancing test, has not been cited in a Board decision in over 30 years, and that it arose at a very different time in terms of the automation and computerization of manufacturing. At any rate, I find that the factors weigh differently in that case than in the instant one. The decision shows that the Respondent used the rule to prohibit an employee from wearing a pro-union hat and union buttons in his work area, but did not prohibit him from entering the facility while wearing those items. Thus, the restriction there did not preclude the employee from exercising his NLRA right to convey a union message to coworkers at the facility. In the instant case, by contrast, the employees' ability to use audio recording to document NLRA violations or unsafe conditions at the facility is completely precluded since employees cannot record such conduct or conditions from inside the lockers where the Respondent requires them to deposit any cell phones they bring into the facility. In addition, the decision in *Campbell* shows that the restriction on NLRA activity was more narrowly tailored than the Respondent's is here. The employer in that case stated that, under its rule, an employee would be allowed to wear a union button in the work area as long as the button had a secure clasp and could wear a hat as long as it was not precariously loose-fitting and "slippery." The balancing test in the instant case might well dictate a different result if the Respondent had similarly tailored the prohibition to its stated justification.

interest in preventing contamination. Of course it does. But the record here shows that that interest is not connected to its cell phone prohibition. Even if the contamination justification could be seen as "legitimate," it would be too speculative and attenuated to outweigh the heavy burden that the Respondent's prohibition places on employees' exercise of their NLRA rights.

The Respondent also proffers a second justification for the prohibition on personal cell phones. It argues that banning personal cell phones and electronic devices is necessary because allowing employees to possess them in the production and warehouse areas would present unacceptable risks of injury to persons or property. This, it should be noted, is the only justification that appears to be asserted to justify the prohibition as it relates to the warehouse employees since the warehouse would not be expected to have, and was not shown to have, open containers or food processing surfaces that could be contaminated by cell phones. Based on my review of the record, I find that the Respondent has not shown that this purported concern over injuries is a legitimate justification for the rules. The Respondent does not identify a single incident when, prior to its promulgation of the rules in 2014 and 2015, one of its employees was distracted by a cell phone while performing work duties, much less any in which such distraction created a safety issue. Even Rank, the only witness who testified about the Respondent's justification for the rule, did not claim to know of any instances in which cell phone distraction had been a problem for the Respondent. Rather than present any evidence, the Respondent's attorneys rely on their own evidence-free assertion that employees with cell phones would recklessly neglect their duties and engage in a parade of horribles of distracted behavior. Specifically, counsel asserts that if Respondent's employees had cell phones they would not use them "for protected concerted activities, but for playing games, checking and commenting on Facebook statuses, checking Snapchat posts or posting on Snapchat, texting family and friends, reading the news or other online sources, watching live sports games or movies, and engaging in any other distracting conduct." Brief of Respondent at Pages 14 to 15. The Respondent's interference with employees' NLRA rights cannot be justified by counsel simply assuming the worst about employees.

Rank attempted to impart weight to the purported safety justification by noting that employees operate forklifts in the production and warehouse areas of the San Antonio facility. Tr. 148. As noted above, he does not identify any instances when the possession of cell phones resulted in one of its employees being distracted, much less being so distracted as to create a safety issue. I note, moreover, that the use of forklifts is ubiquitous in manufacturing and warehouse facilities. The Respondent did not provide a basis for believing that the use of this standard piece of equipment represents special risks at its facility. To the contrary, under the Respondent's theory, safety concerns would override employees' NLRA rights to carry cell phones at any facility that uses forklifts or similar equipment in a typical manufacturing environment. Moreover, as with the Respondent's claims about contamination risk, I find that the cogency and sincerity of its risk assessment with respect to safety is undercut by the fact that the cell phone policy allows line lead employees to possess and even use cell phones while performing the same tasks as other employees and allows any employee to possess a cell phone in work areas as long as the phone is company-issued.

Even assuming that some type of restriction on cell phones is warranted to address safety concerns at the Respondent's facility, the Respondent has not shown that those safety concerns are a legitimate justification for the rules at-issue here. The Respondent did not provide credible evidence that any such concerns could not be addressed with a narrower restriction—for example, a prohibition on the *use* of cell phones *while driving* a forklift or *operating* equipment—that would not trammel employees' rights under the Act to make phone calls or recordings for their mutual aid and protection. For these reasons, I find that Respondent's proffered safety justification is not legitimate. Moreover, even if it were legitimate, I would find that the substantial interference that the Respondent's rules impose on employees' interests in the exercise of their NLRA rights outweighs any legitimate safety interest that is addressed by those rules.

As discussed earlier in this decision, the rule at-issue in this case is of a different type than the one the Board approved in *Boeing*. I am also mindful of the fact that the employer in this case is a very different type of employer than the employer in *Boeing*. In *Boeing*, the Board noted that the employer was "one of the country's most prominent defense contractors," and stated that "the American people have a substantial interest in permitting [it] to prohibit the use of cameras in facilities where work is performed that directly affects national security." The Boeing restriction also addressed the risk of espionage and terrorism. The primary justification that the Respondent proffers in the instant case—the possible contamination of product—is less weighty. If a cell phone were to be dropped into an open food container it would require a clean-up effort and the disposal of tainted product. But the evidence did not show that tainted product would have any chance of getting past quality controls and reaching consumers. As already discussed, the Respondent did not identify a single instance in which an employee's possession of a cell phone resulted in contamination of food product, much less any instance in which cell phone-tainted product escaped the plant. At any rate, the Respondent's purported concern about contamination from personal items is, to put it diplomatically, selective in that the rules do not prohibit employees from possessing multiple other items that present risks of contamination and allows supervisors to carry cell phones while performing exactly the same tasks as the employees who the rules prohibit from carrying them.

For the reasons discussed above, I conclude that, under the standards announced in *Boeing*, the Respondent has unlawfully interfered with employees NLRA rights in violation of Section 8(a)(1) by maintaining rules prohibiting employees from possessing personal cell phones on the manufacturing floor and/or at their workstations.

CONCLUSIONS OF LAW

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

2. The Respondent has unlawfully interfered with employees' exercise of their NLRA rights in violation of Section 8(a)(1) by maintaining rules prohibiting employees from possessing personal cell phones on the manufacturing floor and/or at their workstations.

Remedy

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. Prior to the remand, the General Counsel asked that I order that the notice in this case be posted not just at the Respondent's San Antonio facility, but at all the Respondent's facilities nationwide. I find that it is appropriate under the circumstances present here to confine the posting remedy to the one facility about which specific evidence was presented at the hearing, i.e., to the San Antonio facility. The evidence does not show that circumstances at the Respondent's other facilities are sufficiently similar that an independent analysis of those circumstances is not warranted.[11] Moreover, the parameters of the policy regarding cell phone possession in this case are set by the combined action of one rule promulgated at the corporate-wide level and a second rule that was promulgated at the San Antonio facility. The latter rule was not shown to be in place at other facilities, and certainly not at *all* the Respondent's facilities. I am unable to conclude on the record here that the circumstances regarding facility-specific rules at other facilities would not mitigate the unlawful interference that the corporate-wide rule imposes under the circumstances shown at the San Antonio facility.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[12]

ORDER

The Respondent, Cott Beverages, Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with employees' exercise of their NLRA rights in violation of Section 8(a)(1) by maintaining rules prohibiting employees at its San Antonio, Texas, facility from possessing personal cell phones on the manufacturing floor or at their workstations.

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

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

(a) Rescind its policies prohibiting employees at its San Antonio, Texas, facility from possessing personal cell phones on the manufacturing floor and/or at their workstations.

(b) Furnish employees at the San Antonio, Texas, facility with inserts for the current policies that (1) advise employees that the unlawful prohibition has been rescinded, or (2) provide the language of a lawful prohibition, or to the extent that that the Respondent has not already done so, publish and distribute revised policies that (1) do not contain the unlawful prohibition, or (2) provide the language of a lawful prohibition.

(c) Within 14 days after service by the Region, post at its facility in San Antonio, Texas, copies of the attached notice marked "Appendix."[13] 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, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 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 January 2016.

Dated, Washington, D.C. October 7, 2019

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with your exercise of rights guaranteed you by Section 7 of the Act by maintaining rules prohibiting you from possessing personal cell phones on the manufacturing floor and/or at your workstations.

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

---

[11] I considered that Rank, a manager at the corporate level, testified that the operations he described did not differ meaningfully from one facility to the next. However, I found him an unreliable witness in this regard. I note in particular that Rank testified that line lead employees did not fill-in for employees who work on the production line when they go on breaks, but the evidence showed that at the San Antonio facility line lead employees do exactly that.

[12] 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.

[13] 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."

WE WILL rescind the policy prohibiting you from possessing possessing personal cell phones on the manufacturing floor and/or at your workstation.

WE WILL furnish you with inserts for the current policies that (1) advise that the unlawful prohibition has been rescinded, or (2) provide the language of a lawful prohibition, or to the extent that that we have not already done so, publish and distribute revised policies that (1) do not contain the unlawful prohibition, or (2) provide the language of a lawful prohibition.

COTT BEVERAGES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-181144 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.