Alcoa Corporation *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104. Case 25–CA–219925

April 16, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

On March 27, 2019, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The issues presented in this case arise from the Respondent's interviews of several bargaining-unit employees in connection with its investigation into another unit employee's alleged workplace misconduct. That employee was discharged as a result of the investigation, and the Union grieved the discharge. We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to provide the Union with the names of employees who provided witness statements during the Respondent's investigation.[3] We also agree with the judge, for the reasons he states, that the Respondent's delay in providing the Union with the dates on which it interviewed the witnesses violated Section 8(a)(5) and (1). For the reasons discussed below, however, we reverse the judge's finding that the Respondent violated Section 8(a)(1) by instructing witnesses to keep their investigative interviews confidential.

I. BACKGROUND

The facts of the case are set forth more fully in the judge's decision. Briefly, the Respondent, Alcoa Corporation, operates an aluminum production facility in Newburgh, Indiana. The employees involved in the incident in question are represented by the Charging Party Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104, and were covered by a collective-bargaining agreement in effect from May 16, 2014, to May 15, 2019.

In March 2018,[4] Terrance Carr, the Respondent's labor relations specialist, received reports that Ronald Williams, a shipping department employee, had directed racially charged and national origin–based comments toward contract truckdrivers, exploited his position by unfairly forcing some drivers to wait excessive periods of time to unload their trucks, and generally subjected others to disrespectful treatment. In the process of investigating the reports, Carr conducted interviews with four contract drivers and six bargaining unit employees in late March and early April. At the hearing, the parties stipulated that, during those interviews, Carr told each employee to keep in mind that their interview conversation was confidential, to keep the conversation confidential, including from supervisors and other employees, and to decline to answer if others asked about the conversation. Carr testified at the hearing in this case that the reason he instructed employees to maintain confidentiality was that "historically hourly

[1] The Respondent has implicitly 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.

[2] We have amended the judge's conclusions of law consistent with our findings herein, and we have modified the judge's recommended Order to conform to our findings, to the Board's standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc*., 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

[3] We adopt the judge's finding that the Respondent unlawfully failed to provide the witness names on the grounds that the requested information was relevant and necessary to the Union's pending grievance, see, e.g., *American Medical Response West*, 366 NLRB No. 146, slip op. at 2 (2018), and that the Respondent failed to demonstrate any legitimate confidentiality interests that outweighed the Union's need for the information. As to the latter, the Respondent admits that it did not have any basis for believing that the Union was retaliating against employees cooperating with the investigation when it denied the Union's request for the information on April 23. In addition, as the judge found, even assuming the April 26 and May 18 emails received by the Respondent involving hearsay reports of alleged witness intimidation by the Union are relevant to the continuing nature of the violation since April 23, the Respondent has failed to demonstrate that those emails, which went uninvestigated by the Respondent, raised legitimate confidentiality concerns that would justify the Respondent's withholding of the witness names. In agreeing with the judge in this regard, we do not rely on his statements about employer interests in internal union matters made in connection with his discussion of the May 18 email.

As to the remedy for this violation, we shall order the Respondent to provide the witness names because we agree with the judge that the Respondent has failed to meet its burden of establishing that the Union no longer needs that information. The Respondent's exceptions to this aspect of the judge's remedy renew the arguments made to, and rejected by, the judge and present no new evidence to support its assertion that the Union no longer needs the requested information. If new evidence subsequently became available, the Respondent may raise the issue in compliance. *Boeing Co.*, 364 NLRB No. 24, slip op. at 4–5 (2016).

[4] Unless otherwise noted, all dates are 2018.

employees did not write out statements on other hourly employees." The parties stipulated that no employees requested confidentiality during the interviews.

Based on the results of the investigation, the Respondent suspended Williams for 3 days on April 6, pending further action. On the next day, the Union made a preliminary request for information, including interview notes. On the day after that, the Respondent provided Carr's summaries of all 10 investigatory interviews, with the names of the unit employees redacted.

By letter dated April 9, the Respondent terminated Williams effective April 10. Soon thereafter, in reply to a more extensive information request from Tim Underhill, the Union's grievance chair, the Respondent provided the handwritten statements prepared by four of the interviewed unit employees, with their names redacted. (The other two employees did not give written statements.) One of the unit employees who provided a written statement was John Taborn, a union steward at the time. In a May 18 email, Taborn informed Carr that he had spoken with Underhill and told him that he had provided a statement supporting the allegations against Williams. Taborn claimed that he was removed from his steward's position as a result. There is no evidence or allegation that the Respondent rebuked or disciplined Taborn for this discussion of the investigatory interview with a union official.

The judge found that the Respondent violated Section 8(a)(1) of the Act when Carr issued the confidentiality directive to employees interviewed as part of the investigation into Williams' alleged misconduct. In so doing, the judge found that Carr's instruction interfered with employees' Section 7 right to discuss a workplace disciplinary matter and was particularly problematic because the confidentiality instruction was unlimited by time or place on its face. He noted in this regard that Carr's directive did not include a mitigating statement that the employees could discuss the interviews with others once the investigation was over. Moreover, the judge found that the prohibition extended on its face to discussions the interviewed employees might want to have with anyone, including their collective-bargaining representative. Finally, the judge found that the Respondent failed to demonstrate a legitimate and substantial business justification that outweighed the employees' Section 7 right to discuss workplace disciplinary investigations.

II. DISCUSSION

After the judge's decision issued in this case and the Respondent's exceptions had been filed, the Board issued its decision in *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No.144 (2019) (*Apogee*). In *Apogee*, the Board overruled precedent holding that an employer could lawfully restrict discussion of ongoing investigations only where it made a particularized showing of a substantial and legitimate business justification outweighing employees' Section 7 rights.[5] Instead, the Board held that investigative confidentiality rules that by their terms apply only for the duration of any investigation are *categorically* lawful under the analytical framework set forth in *Boeing Co.*, 365 NLRB No. 154 (2017). Specifically, the Board found that "justifications associated with investigative confidentiality rules applicable to open investigations will predictably outweigh the comparatively slight potential of such rules to interfere with the exercise of Section 7 rights." 368 NLRB No. 144, slip op. at 8. Accordingly, the Board held that investigative confidentiality rules limited to open investigations fall into *Boeing* Category 1(b), obviating any further need for a case-by-case balancing of competing Section 7 rights and management interests.[6] The Board also stated in *Apogee* that its holding "does not extend to rules that would apply to nonparticipants [in an investigation], or that would prohibit employees—participants and nonparticipants alike—from discussing the *event or events* giving rise to an investigation (provided that participants do not disclose information they either learned or provided in the course of the investigation)." Id., slip op. at 2 fn. 3.

In *Watco Transloading, LLC*, the Board held that the *Apogee* framework is applicable to an employer's one-on-one confidentiality instruction to an employee, in all respects except one. 369 NLRB No. 93, slip op. at 8 fn. 24 (2020). Specifically, in *Apogee*, the Board addressed the facial validity of a general written investigative confidentiality policy and held that employees would reasonably interpret such a policy that is silent with regard to the duration of the confidentiality requirement as not limited to open investigations. 368 NLRB No. 144, slip. op. at 9. By contrast, in *Watco* the Board held that where it is presented with an oral one-on-one confidentiality instruction limited to a single specific investigation, it is appropriate for the Board to assess the surrounding circumstances to determine what employees would have reasonably understood concerning the duration of required confidentiality. 369 NLRB No. 93, slip op. at 9 fn. 25.

[5] *Banner Estrella Medical Center*, 362 NLRB 1108, 1109–1110 (2015).

[6] *Boeing* Category 1(b) includes the types of rules that the Board has designated as lawful to maintain because the justifications associated with such rules predictably outweigh their potential adverse impact on employees' exercise of their protected rights under the NLRA. See, e.g., *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 & fn. 2 (2019).

Applying the above precedent, we find, contrary to the judge, that labor relations specialist Carr's confidentiality directives were lawful. Initially, we note that there is no evidence or allegation that the directives were given pursuant to a general company policy or rule, that they applied to anyone other than the employees interviewed during the specific investigation of the allegations against Williams, or that the directives prevented those employees, or any other employees for that matter, from discussing the events giving rise to the investigation.[7] See *Apogee*, supra, 368 NLRB No. 144, slip op. at 2 fn. 3. In sum, the issue presented is limited to whether Carr lawfully directed that interviewed employees keep confidential the information learned or provided during their interviews.

On that issue, we disagree with the judge that Carr's directives were unlawfully unlimited in time and place because they did not include an express statement that employees could talk with others after the investigation was over. As in *Watco*, considering the circumstances surrounding the investigation and its aftermath, we find that employees would reasonably understand that the confidentiality restriction was limited to the duration of the investigation. As discussed above, upon conclusion of the investigation and implementation of the discharge decision, the Respondent itself promptly complied with the Union's requests for notes of the investigatory interviews as well as the written statements provided by unit employees. This was a clear signal that, while the Respondent wrongly considered the names of employee witnesses to be confidential, it no longer considered any of the information disclosed during the interviews to be confidential. Moreover, the Respondent took no adverse actions when employee Taborn, a union steward at the time of his interview, subsequently informed Carr that Taborn and the Union's grievance chair had discussed Taborn's interview and the fact that he gave a statement. In these circumstances, we find that the interviewed employees would have reasonably understood that the confidentiality requirement was limited to the duration of the investigation.

We recognize that the judge found the Respondent's asserted justification for the confidentiality directives to be unpersuasive. But, as the Board held in *Apogee*, an employer is not required to prove a superior management interest in confidentiality on a case-by-case basis. The need to encourage participation in an ongoing workplace investigation is self-evident. 368 NLRB No.144, slip op. at 4–5. In addition, in finding that Carr's confidentiality instruction was overbroad, the judge relied on clearly distinguishable precedent in *SNE Enterprises, Inc.*, 347 NLRB 472 (2006), enfd. 257 Fed.Appx. 642 (4th Cir. 2007), and *Westside Community Mental Health Center*, 327 NLRB 661 (1999). Specifically, the Board in *SNE* found that the employer unlawfully enforced a confidentiality rule against speaking with coworkers about a disciplinary incident to discharge an employee over a month after investigation of that incident was completed. 347 NLRB at 472 fn. 4, 493. In *Westside*, the Board found that the employer unlawfully imposed a confidentiality rule broadly prohibiting two employees from discussing their discipline with coworkers, a restriction not limited to what was discussed during investigatory interviews with those employees. 327 NLRB at 666.

Based on the foregoing, we find that Carr's confidentiality directive to the interviewed employees was lawful. Accordingly, we dismiss the complaint allegation on this issue.[8]

AMENDED CONCLUSIONS OF LAW

Delete paragraph 3 and renumber the subsequent paragraphs accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Alcoa Corporation, Newburgh, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) Refusing to bargain collectively with the Union by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

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

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

[7] We also reject the judge's unfounded speculation that Carr's directive that interviewed employees should not discuss their interviews with employees and supervisors extended on its face to discussions with the Union.

[8] Our colleague dissents yet again to our application of extant law set forth in *Boeing*, *LA Specialty*, and *Apogee*, and also to our commonsense extension of *Apogee* to one-on-one confidentiality instructions in *Watco*. For the reasons fully set forth in those cases, we adhere to that precedent. Further, for the reasons set forth above, we disagree with her view that the facts of this case warrant finding a violation for the confidentiality directive even under the controlling precedent with which she so vehemently and repeatedly disagrees.

(a) Furnish to the Union in a timely manner the names of witnesses who provided statements to the Respondent requested by the Union on April 16, 2018.

(b) Post at its Newburgh, Indiana facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 25, 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 16, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. April 16, 2021

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting in part.[1]

This case continues the erosion of employees' right under Section 7 of the National Labor Relations Act to discuss discipline and disciplinary investigations with their coworkers and their union.[2] Traditionally, the Board has protected that right by allowing employers to impose confidentiality requirements only if they could prove that a legitimate and substantial business justification outweighed employees' rights in the circumstances of a particular case.[3] That changed when the current Board majority overruled precedent in *Apogee*, over my dissent.[4]

Apogee allowed employers to adopt and maintain gag rules regarding investigations, so long as the rule, by its terms, applies only until the investigation is over. The impact of such rules on employee rights was "comparatively slight,"[5] the *Apogee* Board mistakenly claimed, asserting that employees necessarily would understand that they were not prohibited from discussing the events underlying the investigation or from communicating with union representatives or the Board.[6] In dissent, I pointed out the flaws of *Apogee*.[7] It gives far too little weight to employees' statutory rights and to the potential chilling effect of

[9] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

[1] I concur that the Respondent violated Sec. 8(a)(5) and (1) of the National Labor Relations Act by failing and refusing to provide the Union with the names of employees who provided witness statements during the Respondent's investigation and by unreasonably delaying in providing the dates of the interviews.

[2] Sec. 7 of the Act grants employees the right 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." 29 U.S.C. §157. It is an unfair labor practice under Sec. 8(a)(1) of the Act for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. §158(a)(1).

[3] See *Banner Estrella Medical Center*, 362 NLRB 1108, 1109–1111 (2015) (tracing development of Board doctrine), enf. denied on other grounds 851 F.3d 35 (D.C. Cir. 2017).

[4] *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019), overruling *Banner Estrella*, supra. I dissented there. See id., slip op. at 12–21 (dissenting opinion). *Apogee* itself is a product of the majority's decision in *Boeing Co.*, 365 NLRB No. 154 (2017), which radically changed the Board's general approach to employer work rules, greatly expanding employer prerogatives at the expense of chilling employees' exercise of statutory rights. I dissented in *Boeing*. See id., slip op. at 29–44. (dissenting opinion). I summarized the flaws of *Boeing* in my dissent in *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 8–9 (2019).

[5] *Apogee*, supra, 368 NLRB No. 144, slip op. at 8.

[6] Id., slip op. at 8, 11 & fn. 21.

[7] Id., slip op. at 17–19 (dissenting opinion).

employer rules, enforceable by discipline or discharge. Meanwhile, the supposed limitations on the permissible scope of confidentiality rules were meaningless, viewed from the perspective of employees who are economically dependent on the employer and who do not interpret rules as a lawyer might.

After *Apogee*, the Board soon expanded employers' ability to silence employees, even where no workplace rule was in effect. *Watco* involved an employer's oral instruction to an employee not to discuss a disciplinary interview with anyone.[8] The Board applied the categorical approach of *Apogee,* but with a twist that helped employers.[9] An oral confidentiality instruction, the *Watco* Board held, was lawful if, in the majority's view, an employee would understand that the instruction was limited to the duration of the employer's investigation—even if the instruction itself did not say so.[10] But in neither case—rule or oral instruction—is the employer required to make any showing that its legitimate interests outweigh employee rights in the particular circumstances.

Today, reversing the administrative law judge's pre-*Apogee* decision and applying *Watco*, the majority finds an employer's oral confidentiality instruction lawful. It concludes that, "employees would reasonably understand that the confidentiality restriction was limited to the duration of the investigation," despite the absence of any such limitation in the instruction. As for the employer's asserted justification for requiring confidentiality (which the judge rejected), it is immaterial. Under *Apogee* an employer's overriding interest in silencing employees in every investigation, regardless of the circumstances, is deemed by the majority to be "self-evident."

As I will explain, today's decision illustrates the flaws of *Watco*, of *Apogee*, and of the Board's general approach to work rules, particularly its view of how employees interpret employer rules.[11] In this case, the violation of employees' rights under the Act is clear, not only under prior Board law, but even under the new precedent applied by the majority.

I.

The key facts here are simple and undisputed. Consistent with the Board's pre-*Apogee* case law, in turn, the judge correctly found that Alcoa's confidentiality instruction was unlawful.

A.

This case involves an employer's disciplinary investigation in a unionized workplace, which culminated in the discharge of an employee. Alcoa, the respondent employer, investigated reports that that an employee, Williams, had seriously mistreated contractors. Alcoa's investigator, Carr, conducted interviews with six employees in the bargaining-unit. None of the employees asked for confidentiality. But Carr told them that their conversation was confidential and instructed them to keep the conversation confidential (including from supervisors and other employees) and to decline to answer if others asked about the conversation. At the hearing in this case, Carr testified that his instruction to employees was based on the fact that "historically hourly employees did not write out statements on other hourly employees."

After the investigation, Alcoa suspended employee Williams. That discipline triggered an information request from the Union. Alcoa provided summaries of employee statements, but redacted employees' names. It then discharged Williams. The Union filed a grievance on behalf of Williams and asked Alcoa for more information. Alcoa provided handwritten statements from four employees, again with names redacted.

In refusing to provide employees' names to the Union, investigator Carr, on Alcoa's behalf, falsely asserted that "the employees requested and were given, an assurance of confidentiality at the time they gave their statements." He also asserted that there was "a significant risk that intimidation or harassment of witnesses will occur as demonstrated by a recent incident of misconduct reported to management."[12]

B.

On these facts, before the *Apogee* Board reversed precedent, Administrative Law Judge Bogas correctly found a violation of Section 8(a)(1). In *Banner Estrella*, supra, overruled in *Apogee*, the Board had reiterated that "[e]mployees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers, and that "[a]ccordingly, an employer may restrict those discussions only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights."[13]

[8] *Watco Transloading, LLC*, 369 NLRB No. 93, slip op. at 8–9 (2020). I was not a Member of the Board when the case was decided. My prior Board term ended on December 16, 2019, and my current term began on August 10, 2020, after *Watco* issued.

[9] Id., slip op. at 8 & fn. 24.

[10] Id., slip op. at 8–9 & fn. 25.

[11] I have addressed that issue before. See, e.g., *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 9–11 (dissenting opinion).

[12] The employee statements included one from Taborn, a union steward at the time. Investigator Carr had received hearsay reports that Taborn had informed a Union official about his cooperation with the investigation and had lost his steward position as a result. Later, Taborn e-mailed Carr to the same effect.

[13] *Banner Estrella*, supra, 362 NLRB at 1109. See, e.g., *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011), enfd. in pertinent part 805 F.3d 309 (D.C. Cir. 2015); *Phoenix Transit System*, 337 NLRB

Alcoa failed to make that showing in this case, for the reasons that the judge explained.

The confidentiality instruction here was very broad. The judge observed that it "was unlimited in terms of both duration and place," and "did not include a mitigating statement that the employees could discuss the interviews with others once the employer's investigation was over or at any other time." "[O]n its face," the judge observed, the instruction "prohibit[ed] any discussions the interviewees might want to have with anybody at all, including their collective bargaining representative."

Alcoa failed to establish a legitimate and substantial business justification for such a broad confidentiality requirement. As the judge pointed out that Alcoa did "not claim [that the instruction] was justified, by the need to complete its investigation without witnesses influencing one another's accounts." Rather, the "only justification offered" was Carr's assertion that 'historically hourly employees did not write out statements on other hourly employees.'" But this assertion, the judge explained, was "not supported by evidence of specific examples, or even the mention of specific examples," and, indeed, Alcoa had conceded that no employees had requested confidentiality. The judge found that the "testimony did not show that any of the interviewees demonstrated discomfort or reticence about reporting on [the accused employee's] conduct." Moreover, the judge pointed out, a confidentiality instruction directed only to the interviewed employees themselves—with no suggestion to employees that *other* persons, such as supervisors or managers, were also bound—would have done little to reassure employees that their cooperation would not become known. Instead, the instruction "merely interfere[d] with the interviewees' own freedom to decide under what circumstances to discuss a workplace issue with coworkers and others."

II.

The majority now reverses the administrative law judge. It applies the legal principles, and sub-principles, adopted in *Apogee* and *Watco*: Employer confidentiality rules that are applicable, by their terms, to open investigations are categorically lawful, no matter what justifications for requiring confidentiality an employer offers or fails to offer. Such rules are presumed not to apply to employee discussions of the events underlying the investigation or to employee communications with their union or the Board, whether or not the rules actually include these exceptions. These principles all apply to oral confidentiality instructions, with one exception. Depending on the circumstances, an instruction (unlike a rule) may be deemed to apply only while an investigation is open, whether or not this limitation is actually stated.

For the majority, only this last principle comes into play here. Under *Apogee*, as explained, it is immaterial that the judge rejected Alcoa's justification for the confidentiality instruction, as unsupported. Rather, the decisive issue is whether Alcoa's confidentiality instruction was limited to the duration of the investigation. The majority rejects the judge's finding that the instruction "was unlimited in terms of both duration and place." Instead, it concludes that "considering the circumstances surrounding the investigation and its aftermath, . . . employees would reasonably understand that the confidentiality restriction was limited to the duration of the investigation."

III.

The majority's decision rests on premises – embodied in the *Apogee* and *Watco* decisions—that are contrary to both the policies of the National Labor Relations Act and the requirement of reasoned decision-making imposed on the Board by the Administrative Procedure Act.[14] This case, as I will show, illustrates the deep flaws of these earlier decisions upholding investigative-confidentiality requirements. But even accepting *Apogee* and *Watco*, the majority's decision is incorrect. There is no substantial evidence to support the conclusion that employees would have understood the confidentiality instruction at issue to be limited to the duration of the investigation.

A.

The Board erred in deciding *Apogee*, categorically upholding employer confidentiality rules, and erred again in deciding *Watco*, which extended *Apogee* to oral confidentiality instructions.

1.

As noted, I dissented in Apogee, and there is no need to repeat my dissent at length today. I explained there that the "right of employees to discuss discipline and disciplinary investigations is well established in Board precedent, and it has been recognized by the courts."15 That right is

510, 510 (2002), enfd. 63 Fed.Appx. 524 (D.C. Cir. 2003); *Caesar's Palace*, 336 NLRB 271, 272 (2001). See also *Inova Health System v. NLRB*, 795 F.3d 68, 85 (D.C. Cir. 2015) (recognizing "settled Board precedent holding that employees have a protected right to discuss discipline or disciplinary investigations with fellow employees" and affirming that "[a]n employer may prohibit such discussion only when a 'substantial and legitimate business justification' outweighs the 'infringement on employees' rights'").

[14] As the Supreme Court has made clear, the APA requirement to engaged in reasoned decisionmaking applies to Board adjudication. *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." Id.

[15] *Apogee*, supra, 368 NLRB No. 144, slip op. at 14 (dissent) (footnotes collecting cases omitted).

not limited to discussions among coworkers, but includes communicating with third parties, such as union representatives and Board agents.[16] I endorsed the Board's existing approach, exemplified in cases like Banner Estrella, which required employers to proceed on a case-by-case basis in imposing investigative-confidentiality restrictions on employees. This approach properly accommodated the competing interests of employers and employees. It focused the Board, the employer, and employees on the relevant circumstances of each case and so tended to minimize the chilling effect on employees, who would better understand not just "why nondisclosure is being requested, but also what matters are not appropriate for conversation.'"[17] Under the new approach of Apogee, I explained, the Board abandoned a case-by-case balancing of employee rights and employer interests, in favor of a categorical determination upholding all confidentiality rules limited to open investigations, regardless of justification.[18]

With respect to the rules at issue in *Apogee*—and rules like them, now categorically approved—I pointed out that the majority effectively read exceptions into the rules that employees could not reasonably be expected to discern: (1) that employees were free to discuss employer investigations with the Board, with other government agencies, or with union representatives, because the rule did not *expressly prohibit* such communications; and (2) that they were free to discuss the events underlying the investigation, even if they could not discuss the investigation itself – a fine distinction that would surely be lost on the typical employee.[19]

Apogee threatened real harm to employees' Section 7 rights. As I observed, the "likely chilling effect on workers—who will feel compelled to choose safe silence over risky speech—is both obvious and alarming."[20] For example, a "union activist who believes she is being unfairly targeted for investigation by company officials looking for a pretext to discipline her will be left to wonder if asking for help from coworkers, consulting with the union, or even approaching the National Labor Relations Board during the course of the employer's investigation will put her job at risk."[21] Id.

2.

Watco extended *Apogee* to cases involving an employer's oral confidentiality instruction to employees, in the course of an investigation. This extension only exacerbated the problems with *Apogee*. A fundamental flaw in *Apogee*, as explained, is its rejection of the view that the particular circumstances matter with respect to investigative-confidentiality requirements. After *Apogee*, employers are free, in all circumstances, to maintain rules requiring confidentiality for open investigations. They need not narrowly tailor those rules to avoid chilling employees' exercise of Section 7 rights, because the Board has unreasonably deemed the impact of such rules on employee rights small. In *Watco*, where no employer rule was in place and the confidentiality instruction was made in a specific factual context, the Board might have been expected to engage in individualized scrutiny: to hold that the instruction's legality did depend on the circumstances and on whether, in that setting, the employer's legitimate interests outweighed the impact on employee rights. Notably, this is the principle that the Board has long followed with respect to employer no-solicitation requirements.[22]

Instead, the *Watco* Board treated a confidentiality instruction as if it were a rule but considered the surrounding circumstances in a way that made an instruction even easier to defend than a rule. Thus, the *Watco* Board held that under the circumstances presented there, an employee would interpret the instruction as limited to the duration of the investigation, even though the instruction itself was silent on that point.[23] This approach—purporting to view an employer statement from the perspective of an employee, but favoring a noncoercive interpretation—is a hallmark of the Board's reigning approach to work rules under *Boeing*, which I have criticized.[24] Because it does not account for the tendency of economically-dependent employees to pick up on the coercive implications of employer statements that other persons would not hear, as the

[16] Id.

[17] Id., slip op. at 14–15, quoting *Banner Estrella*, supra, 362 NLRB at 1111–1113.

[18] Id., slip op. at 16 (emphasis in original).

[19] Id., slip op. at 17–18. The approach of the *Apogee* Board in this context is very different from the Board's sounder approach in cases involving implicit employer prohibitions on filing unfair labor practice charges with the Board. Id., slip op. at 18 fn. 44, citing *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 6 (2019).

[20] *Apogee*, supra, 368 NLRB No. 144, slip op. at 13.

[21] Id.

[22] Under Board law, an employer's no-solicitation rule is presumptively lawful, if it is narrowly tailored to apply only to solicitation on working time. *Our Way*, 268 NLRB 394 (1983). If the employer has not previously adopted a no-solicitation rule, but nevertheless prohibits an employee's solicitation, the employer must prove that the solicitation interfered with production or discipline, even if it occurred on working time. *Trico Industries,* 283 NLRB 848, 848 fn. 1 & 851–852 (1987). See, e.g., *Cal Spas*, 322 NLRB 41, 56 (1996), enfd. in relevant part 150 F.3d 1095 (9th Cir. 1996).

[23] *Watco*, supra, 369 NLRB No. 93, slip op. at 8–9. The Board distinguished between a confidentiality rule that was silent with regard to duration (which employees would reasonably interpret as "not . . . limited to open investigations") and "an oral confidentiality instruction issued in, and limited to, a single, specific investigation," where the circumstances "reasonably would have informed [the employee] that the instruction was limited to the duration of the investigation." Id., slip op. at 9 fn. 25.

[24] See *LA Specialty*, supra, 368 NLRB No. 93, slip op. at 9 (dissent).

Supreme Court recognized in *Gissel Packing*[25]—and because it presumes that a reasonable employee would interpret oral instructions to include caveats that were never expressly stated—the Board's approach fails to adequately protect against the chilling potential of employer statements.

In the context of employer confidentiality instructions, it should be enough that an employee could reasonably interpret the instruction as coercive—for example, because it extends past the end of the investigation (per *Apogee*). That standard is in line with the Board's long-established general approach under Section 8(a)(1) of the Act, which asks simply whether employer speech or conduct has a reasonable tendency to coerce employees.[26] Instead, the Board now seem to require that the coercive interpretation be the *only* reasonable interpretation possible, before it will find a violation.[27]

B.

Today's decision, applying *Apogee* and *Watco* to find no violation of the Act, illustrates all the flaws in the approach adopted in those decisions.

As explained, the confidentiality instruction here, by its terms, was unlimited in time and scope. Employees were instructed not to talk about the investigation. That prohibition clearly covered talking to coworkers, among others. There was no stated exception for communications with the Union or the Board. Nothing in the instruction suggested that employees were free to talk about the events underlying the investigation, even if they could not discuss the investigation itself. Nor did the instruction indicate, explicitly or implicitly, that it applied only while the investigation was open. There is no factual basis, then, to conclude that any of the hypothetical limits on confidentiality touted by the *Apogee* Board are meaningful.

But in applying *Apogee* here, the majority assumes that employees took from the instruction that they *could* discuss any aspect of the conversation with their union representative or a Board agent, that they *could* discuss the underlying events, and that they *could* discuss the investigatory interview once the investigation is complete. Employees were not told any of those things, though, and I see no reason why we should assume that employees would believe them. The judge correctly took Alcoa's words at face value. In contrast to my colleagues, he did not assume that employees would read into the confidentiality instruction things that the employer did not say. Board law supports the judge's approach. As the Board has explained recently, "[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint."[28]

Of particular significance here is that, in contrast to *Watco*, employees were represented by a union.[29] Union-represented employees can be expected to wonder whether a broad confidentiality instruction applies to communications with their representative. An employer instruction that is privately directed to individual employees, and that does not acknowledge the union's role despite its representative status, will likely be interpreted as prohibiting communication with the union. That is especially true in this case, where Alcoa's instruction directed employees not to answer others' questions about the interview: a union representative is the most logical person in the workplace to be asking such questions. In a unionized workplace like this one, a broad confidentiality instruction not only threatens to restrict employees' Section 7 right to discuss disciplinary matters with their coworkers for "mutual aid or protection," it also implicates employees' right to "assist labor organizations." 29 U.S.C. §157.[30]

It should be clear, then, that Alcoa's confidentiality instruction had a reasonable tendency to (in the words of Section 8(a)(1) of the Act) "interfere with, restrain, or coerce" employees in the exercise of their statutory rights. Balanced against this coercive tendency is nothing in the way of a legitimate and substantial employer interest actually established by Alcoa. The judge correctly found

[25] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (noting that accommodation of employer and employee rights must take into account the "economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear").

[26] *American Freightways Co.*, 124 NLRB 146, 147 (1959).

[27] See *LA Specialty*, supra, 368 NLRB No. 93, slip op. at 10–11.

[28] *Prime Healthcare*, supra, 368 NLRB No. 10, slip op. at 6 fn. 12, quoting *Ingram Book Co*., 315 NLRB 515, 516 fn. 2 (1994). Moreover, in violation of the Supreme Court's admonition, the majority fails to account for the way the power imbalance between employers and employees impacts how employees view employer instructions and make them reluctant to test the limits of an employer's command. See *Gissel Packing Co*., supra, 395 U.S. at 617.

[29] The confidentiality instruction in *Watco* was made during a union-organizing campaign, but employees were not represented by a union. They were told that confidentiality was required to limit employees' coordinating their stories, a justification that did not implicate the union's potential role in assisting employees

[30] Notably, an employer has a lesser confidentiality concern with respect to employee communication with a union representative, because

> [u]nion representatives, by virtue of their legal duty of fair representation, may not, in bad faith, reveal or misuse the information obtained in an employee interview. A union representative's fiduciary duty to all unit employees helps to assure confidentiality for the employer.

IBM Corp., 341 NLRB 1288, 1293 (2004). The union also has an ongoing relationship with the employer where there are built-in incentives to amicably resolve disputes and to respect concerns about confidentiality. Id. at 1292–1293.

that Alcoa's justification—the supposed reluctance of employees to cooperate with the investigation of a coworker, unless promised confidentiality—had no evidentiary support. For the majority, this is immaterial. What matters instead is that the Board has already determined that investigative-confidentiality rules (and instructions) are always lawful, if limited to open investigations, because employers will always have an interest that outweighs employee rights.

As I have explained in connection with the similar, categorical treatment of employer nondisparagement rules,[31] the majority's approach is simply not reasoned decision-making. It disregards the facts presented in a particular case, and it fails to give reasonable weight to employees' Section 7 rights.

C.

But even applying the *Apogee* and *Watco*, the Board should find a violation of Section 8(a)(1) in this case, because under the circumstances, a reasonable employee would have understood Alcoa's confidentiality instruction as *not* limited to the duration of the investigation, the crucial question as framed by the majority. Recall that nothing in the instruction itself suggested this limitation. The silence of a confidentiality instruction with respect to duration is surely enough for a reasonable (and vulnerable) employee—subject to discipline if he violates the instruction—to infer that it applies even after the investigation is over, absent some reason *not* to draw this inference. Here, the circumstances cited by the majority are not enough to overcome the silence of the instruction—far from it.

First, my colleagues point out that after the investigation was over, Alcoa provided the Union with notes of the employee interviews as well as written statements from bargaining-unit employees. This step, says the majority was a "clear signal that . . . it no longer considered any of the information disclosed during the interviews to be confidential." But there is no evidence that this supposed "clear signal" was ever communicated by Alcoa to the employees subject to the confidentiality instruction. And, in any case, the signal was hardly clear. Alcoa unlawfully redacted the names of the witnesses in the statements provided to the Union. If anything, the redaction was a "clear signal" that employees still should not talk, even after the culmination of the investigation.

Second, the majority observes that Alcoa "took no adverse actions when employee Taborn, a union steward at the time of his interview, subsequently informed [investigator] Carr that Taborn and the Union's grievance chair had discussed Taborn's interview and the fact that he gave a statement." But here, too, there is no evidence that employees subject to the confidentiality instruction both knew of Taborn's situation and were aware that Alcoa had not disciplined him for violating the instruction.

In short, there is no substantial evidence in the record to support that majority's conclusion that employees would have understood Alcoa's confidentiality instruction as limited to the duration of the investigation. Thus, under *Apogee*, the Board is required to scrutinize the instruction to determine its lawfulness, balancing Alcoa's asserted interest against the harm to employees' Section 7 rights.[32] For reasons already explained, the instruction cannot survive such scrutiny: Alcoa's asserted interest had no evidentiary support, as the judge found. Even under *Watco*, then, the Board should find that the confidentiality instruction was unlawful.

IV.

As predicted, the Board's adoption of a radically different approach to employer work rules, announced in 2017 with *Boeing*, has expanded employer prerogatives at the expense of employees' rights under the National Labor Relations Act. This unfortunate result is especially clear in cases like this one, involving employer attempts to restrain employee speech about ongoing disciplinary investigations. Today's decision seems an especially tortured effort to excuse an employer's obvious infringement of the Act, even under the Board's new framework. The lesson is that when the Board says that a certain type of rule is always lawful, it means what it says – whatever the Act's policies or the record evidence might suggest. I dissent.

Dated, Washington, D.C. April 16, 2021

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Lauren McFerran, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

[31] *BMW Mfg. Co.*, 370 NLRB No. 56, slip op. at 9–11 (2020). As I explained in *BMW,* with respect to rules treated as categorically lawful, the Board post-*Boeing* no longer must "meaningfully address the facts of the case, let alone perform a genuine balancing analysis" and the "specific justifications presented by the [employer] – which should have the burden to show that its legitimate business interests should prevail over Section rights – are not acknowledged." Id., slip op. at 9.

[32] 368 NLRB No. 144, slip op. at 9–10.

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 refuse to bargain collectively with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT refuse to bargain collectively with the Union by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL furnish to the Union in a timely manner the names of witnesses who provided statements to the Respondent requested by the Union on April 16, 2018.

ALCOA CORPORATION

The Board's decision can be found at www.nlrb.gov/case/25-CA-219925 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.

Raifael Williams, Esq., for the General Counsel.
Sarah Rain, Esq. (Ogletree Deakins, Nash, Smoak and Steward, P.C.), of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Evansville, Indiana, on February 5, 2019. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 (the Charging Party or the Union) filed the original charge on May 9, 2018, and an amended charge on August 28, 2018. The Regional Director for Region 25 of the National Labor Relations Board (the Board) issued the complaint on September 27, 2018. The complaint alleges that Alcoa Corporation (the Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act) on March 19, 20, and April 3 and 5, 2018, by instructing employees who it interviewed during an investigation of a coworker's conduct not to discuss the interviews with other employees. The complaint further alleges that the Respondent violated Section 8(a)(5) by refusing, since April 23, 2018, to provide the Union with information requested on April 16 and again on April 26, and by unreasonably delaying the delivery of other information the Union requested on those dates. The Respondent filed a timely answer in which it denied committing the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures aluminum and aluminum products at its facility in Newburgh, Indiana, from which it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of Indiana. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The events at issue in this case took place at the Respondent's Warrick Operations facility, in Newburgh, Indiana. Approximately 1600 persons work at that facility, of whom between 1100 and 1200 are represented by the Union. The most recent collective-bargaining agreement between the Respondent and the Union went into effect on May 16, 2014, and sets forth an expiration date of May 15, 2019.

On April 6, 2018, the Respondent issued a 3-day suspension, pending further disciplinary action, to Ronald Williams, a bargaining unit employee who worked in the shipping department at the loading dock. The disciplinary notice states that the action was taken because Williams had been "creating a hostile work environment." The Respondent's records indicate that, beginning no later than March 8, 2018, the Respondent received

reports that Williams had repeatedly directed offensive racial and national origin-based slurs at contract truckdrivers, had exploited his position by unfairly forcing some drivers to wait inordinately long to load their trucks, and had otherwise subjected people to disrespectful treatment. On March 8, 15, and 19, Terrence Carr, labor relations specialist,[1] interviewed three contract truckdrivers who interacted with Williams at the loading area about Williams' conduct. A fourth contract employee, who was not a driver, was interviewed by Carr on March 13. Carr then interviewed 6 hourly employees about the alleged misconduct by Williams. Only Carr and the interviewee were present for these interviews, which took place on March 19 and 20, and April 3 and 5, 2018. Carr told each of the 6 hourly employees that the interviews were confidential and he directed them not to discuss the interviews with employees or supervisors, and to decline to answer any questions that others asked them about the interviews. Carr testified that he did this because "historically hourly employees did not write out statements on other hourly employees." When testifying at trial, Carr did not claim that any of the employees he interviewed had, in fact, expressed reservations about giving statements. Indeed the parties stipulate that not a single one of the 6 hourly employees had requested confidentiality. (Tr. at 54–55.) The Respondent does not claim that Carr directed human resources staffers, supervisors, managers, and others who came into possession of information about an interview that such information was confidential.

In an April 7, 2018, email, Bruce Price, a union representative for the shipping department, asked Carr to provide a variety of types of information relating to the discipline against Williams, including "all interview notes or video or anything else the company is using during this investigation on this supposed hostile work environment, that you are using against Mr. Williams." During the period of the suspension, the Union was preparing to represent Williams in an internal process during which the Union is given an opportunity to present facts relevant to the disciplinary decision. Carr provided a response to Price on April 8. That response included Carr's summaries of his interviews with 10 individuals. With respect to the four contractors who were interviewed, the Respondent provided the name of the individual. With respect to the 6 hourly employees who were interviewed, Carr withheld the interviewee's name and the date of the interview.

In a letter dated April 9, the Respondent informed Williams that his employment was terminated effective April 10, 2018.[2] On April 9 or 10, the Union submitted a grievance challenging Williams' termination. Subsequently, on April 16, Tim Underhill—he Union's business agent and grievance committee chairman—submitted a request to Carr for information relating to that grievance. The request included 11 paragraphs seeking various types of information. The General Counsel only alleges that the Respondent unlawfully failed to provide and/or unreasonably delayed providing information in response to one of those paragraphs. That paragraph requested:

> Information pertaining to the interviews of the one Dayshift Hourly employee and five afternoon shift hourly employees that were provided by the Company per the information request by Bruce Price on or about 4/7/2018. Information should include Name that coincides with each interview, the date the interview took place, the location w[h]ere the interview took place and a list of names of who was present when the interviews took place.

General Counsel Exhibit Number (GC Exh.) 9, par. 6. Underhill testified that the Union needed this information in order to "investigate whether or not the interviews and the actual process was done, and also to allow us to do an internal investigation and to check up on the facts."

On April 23, Carr responded to Underhill's April 16 request. In his response, Carr refused to provide the names of the hourly employees who were interviewed about Williams' conduct. Carr stated:

> Based on confidentiality request of employee's names will not be shared at this time. Attached we have provided 4 sworn statements from hourly employees that were interviewed. All employees declined union representation. Terrence Carr interviewed all employees with 2 of the interviews taking place in Building 1 and 4 interviews in the Pack/Ship conference room.

GC Exh. 10. Despite Carr's claim to the Union that the 6 hourly employees who were interviewed had requested confidentiality, at trial the Respondent stipulated that not a single one of those individuals had, in fact, requested confidentiality. (Tr. 54–55.) In addition to withholding the names of the bargaining unit employees who were interviewed, this response from Carr withheld the dates when those interviews took place. Carr provided four handwritten statements to Underhill; however, Carr redacted the name of the employee giving the statement and any information showing the date of the statement.

On April 26, Underhill wrote to Carr stating, inter alia, that the Union still needed the names of the hourly employees who were interviewed and also the dates of the interviews. Underhill stated that the Union had a legal right to this information and asked that "if the Company is refusing to provide the information, please state in writing." Underhill informed the Respondent that the Union "need[ed] the information in order to properly investigate this grievance."

Carr responded to that correspondence on April 30. On the subject of the names of the hourly employees who were interviewed, Carr stated:

> It is the Company's position that keeping the identities of the witnesses confidential prior to the arbitration outweighs the union's right to know their identities. This position is based on the fact that the employees requested and were given, an assurance of confidentiality at the time they gave their statements, and there is a significant risk that intimidation or harassment of witnesses will occur as demonstrated by a recent incident of misconduct reported to management. Furthermore, it is the Company's position that it has accommodated the Union's

[1] Carr is an acknowledged supervisor and/or agent of the Respondent within the meaning of Sec. 2(11) and Sec. 2(13) of the Act. General Counsel Exhibit (G Exh.) 1(g), par. 4.

[2] Neither Williams' suspension nor his subsequent discharge is alleged to be unlawful in this proceeding.

> request for information by providing redacted copies [of] the witness statements that contain the facts used by the Company to make the disciplinary decision. The information contained in the statements will allow the Union to effectively represent Mr. Williams during the grievance process.

GC Exh. 12. Although, in this communication, Carr repeated the claim that the interviewees requested confidentiality at the time of the interviews, the Respondent stipulates that not one of those interviewees did, in fact, request confidentiality. The Respondent did not offer to accommodate the Union's request for the names of the hourly employees by providing the names subject to a confidentiality agreement or some other safeguard.

Regarding Carr's claim, in the April 30 communication, that a "recent incident of misconduct" demonstrated that revealing the names of interviewees would create "a significant risk" of "intimidation or harassment of witnesses," the record shows the following. On April 26, Carr received an email from a shipping department supervisor, Wade Shanks, regarding a complaint he reported receiving from John Taborn, a bargaining unit employee and union steward. According to Shanks, Taborn stated that in the past he had stored his boots in a cabinet in the break room rather than in the employee locker room. Taborn heard that the recently elected union representative, James Cameron, had recently posted a note stating "no boots in the cabinets" of the break room. Shanks stated that Taborn told him that the employee who cleans the break room had recently removed his boots from the break room and put them "out in the aisle way outside of the break room filled with garbage." Respondent Exhibit Number (R Exh.) 1.[3] Shanks did not report that Taborn claimed to know why this had happened. Shanks did not testify, but in his email he speculated to Carr that "we can read between the lines on this issue and have an educated guess on why this behavior is happening toward Mr. Taborn." Shanks went on to hypothesize that Taborn's boots were treated in this manner: because Taborn had unsuccessfully run against Cameron in the recent union representative election; and because Taborn had opposed the alleged harassment by Williams and provided information to the Respondent about it.[4] The Respondent concedes that, prior to April 26, it did not have any belief or knowledge that the Union or an employee had retaliated against any employee for cooperating in the Respondent's investigation of Williams' conduct. (Tr. 54–55.) The record does not show that the Respondent investigated the report regarding Taborn's boots.

Underhill, in an email, dated May 1, 2018, to Carr, again referenced the Union's request for information regarding the interviews that were conducted with bargaining unit employees about Williams' alleged misconduct. Two months later, Carr, in a communication dated July 2, 2018, informed Underhill of the dates when hourly employees were interviewed and gave statements. At trial, Carr testified, "I think" the Respondent's previous failure to provide the dates "was merely an oversight." (Tr. 63–64.) The July 2 communication still did not disclose the names of any of the hourly employees who Carr interviewed.

On January 24 and 25, 2019, the Union and the Employer participated in an arbitration of the grievance regarding Williams' discipline. During the arbitration, the Respondent continued to withhold the names of the bargaining unit employees who were interviewed or gave statements during the Respondent's investigation of Williams' conduct. The Union argued to the arbitrator that no weight should be given to the interviews and statements of these employees since the Respondent refused to provide the Union with information about them. In his testimony before me, Underhill stated that the Union currently has approximately 18 pending grievances that are scheduled for arbitration.

Discussion

I. CARR'S DIRECTION THAT EMPLOYEES KEEP INTERVIEW CONFIDENTIAL

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act when Carr told the employees he interviewed about Williams' conduct that the conversations were confidential, should not be disclosed to supervisors or employees, and directed the interviewees to decline to answer any questions about the conversations.[5] Where a violation of Section 8(a)(1) is alleged, the first question is whether the employer's conduct interferes with the employee's rights under Section 7 of the Act. If it does, the employer may escape a finding of violation by demonstrating a legitimate and substantial business justification that outweighs the employee's interests under Section 7. See, e.g., *Verizon Wireless*, 349 NLRB 640,640 fn. 5 and 658 (2007); *Ang Newspapers*, 343 NLRB 564, 565 (2004); *Caesar's Palace*, 336 NLRB 271, 272 fn. 6 (2001).

It is well established that an employer interferes with Section 7 rights by prohibiting employees from discussing workplace concerns, particularly if, as here, they relate to discipline or potential discipline. See *Fresenius USA Mfg., Inc.*, 358 NLRB 1261, 1261 fn. 1 (2012), affd. in relevant part after remand at 362 NLRB 1065 (2015); *Verizon Wireless*, 349 NLRB at 640 fn. 5

[3] Neither Taborn nor Shanks were called to testify. I received Shanks' email regarding Taborn as an exhibit over the hearsay objection of counsel for the General Counsel, but do not consider the email for the truth of the matters asserted regarding either the treatment of Taborn, or what Taborn communicated to Shanks. I do, however, consider the email as evidence that, on April 26, Carr received Shanks' account of a report from Taborn.

[4] On May 18, 2018, about 4 weeks after Carr refused to provide the Union with the names of hourly employees he interviewed, Carr received an email from Taborn stating that the Union had removed Taborn from his position as a union steward. Taborn reported that Underhill told him the reason for this action was that Taborn had given the Respondent information about Williams' conduct, and that Underhill "couldn't get past a steward doing that to another member." Taborn did not testify, or otherwise provide sworn testimony, regarding any statement made to him by Underhill or how he came to contact Carr on May 18. Underhill appeared as a witness, but was not questioned about, and did not testify regarding, the statements Taborn attributed to him in the May 18 email.

[5] In its brief the Respondent contends that Carr "requested (not demanded) confidentiality." (Br. of R. at p. 12.) Respondent's counsel strays into the vicinity of bad faith by making this argument. At trial, the Respondent *stipulated* that Carr told the employees "that their conversations were confidential, that employees should keep the conversations confidential, including from supervision and other employees, and if others asked about the conversations, to decline to answer." (Tr. 54.) This was a directive from the Respondent's acknowledged supervisor and/or agent, not a mere "request."

and 658; *SNE Enterprises, Inc.*, 347 NLRB 472 (2006), enfd. 257 Fed.Appx. 642 (4th Cir. 2007); *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). Moreover, the Board has recognized that an employer's restriction on employee communications regarding an investigation is overbroad when, as here, that restriction is not limited by time or place. See, e.g., *SNE Enterprises*, 347 NLRB at 472 and 492–493, *Westside Community Health Center*, 327 NLRB at 666. In this case, Carr interfered with employees' Section 7 rights by prohibiting them from discussing a workplace matter relating to discipline. That interference is particularly profound because Carr's directive was unlimited in terms of both duration and place. Carr's directive to the employees did not include a mitigating statement that the employees could discuss the interviews with others once the employer's investigation was over or at any other time. Thus, the restriction cannot be justified, and the Respondent does not claim it was justified, by the need to complete its investigation without witnesses influencing one another's accounts. Cf. *SNE Enterprises*, 347 NLRB at 472 fn. 4 and 493 (confidentiality rule was enforced after the investigation was completed and therefore cannot be justified as necessary to "to protect the sanctity of an ongoing investigation"). Moreover, Carr's confidentiality directive extends, on its face, to prohibit any discussions the interviewees might want to have with anybody at all, including their collective-bargaining representative.

Given that Carr's confidentiality directive interfered with the employees' Section 7 rights, it violated the Act unless the Respondent can demonstrate a legitimate and substantial business justification that outweighs the employees' Section 7 rights. *Verizon Wireless*, supra; *Caesar's Palace*, supra; *Westside Community Health Center*, supra. The Respondent has failed to do that. The only justification offered for the confidentiality directive is Carr's assertion that "historically hourly employees did not write out statements on other hourly employees." Carr's conclusory assertion about the historical reticence of hourly employees is not supported by evidence of specific examples, or even the mention of specific examples. Moreover, although Carr falsely claimed to the Union that the interviewees themselves requested confidentiality, the Respondent concedes that *not one* of the employees interviewed actually requested confidentiality. In fact, the testimony did not show that any of the interviewees demonstrated discomfort or reticence about reporting on Williams' conduct.

In addition to being unsupported from an evidentiary perspective, Carr's claim that he imposed the confidentiality directive to protect the interviewees themselves is unsupported from a logical perspective. Specifically, I note that Carr's directive was not that third parties—either other employees, human resources staffers, supervisors or managers–were prohibited from discussing the interviewee's disclosures. If that were the case, then arguably it would provide some reassurance to any interviewees who might be worried that others would find out what they said to Carr. However, the prohibition was imposed on the interviewees themselves, not on third parties, and therefore does not provide that reassurance, but merely interferes with the interviewees' own freedom to decide under what circumstances to discuss a workplace issue with coworkers and others.

I find that the Respondent violated Section 8(a)(1) on March 19 and 20, and April 3 and 5, 2018, when Carr directed employees who he interviewed as part of the investigation of Williams' conduct that the interviews were confidential and should not be disclosed to other employees and that the interviewees should decline to answer any questions about the conversations.

II. INFORMATION REQUEST

A. Respondent's Refusal to Provide the Names of Employees It Interviewed Regarding Williams' Conduct

On April 16, 2018, the Union requested that the Respondent supply the names of the 6 hourly employees who the Respondent interviewed as part of the investigation that led to the suspension and termination of bargaining unit employee Williams. In an April 23 correspondence, the Respondent informed the Union that it would not provide the names. On April 26, the Union repeated its request that the Respondent supply the names and, on April 30, the Respondent again expressly refused to do so. The Respondent has continued to withhold the names, including during the arbitration of the Williams grievance.

An employer's obligation to bargain in good faith under Section 8(a)(5) of the Act, includes the obligation to furnish the employees' bargaining representative, upon request, with information relevant to and necessary for the performance of the Union's statutory duty as the employees' bargaining representative. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–436 (1967). In this case, in order to evaluate the merits of the grievance and/or to challenge the Respondent's claim that Williams engaged in conduct warranting his discharge, the Union needed to identify, and likely interview, the employees whose accounts the Respondent obtained in the course of its investigation. As the Board recently recognized, "Board law is clear that a union's request for witness names made in connection with a grievance constitutes a request for relevant and necessary information." *American Medical Response West*, 366 NLRB No. 146, slip op. at 2 (2018); see also *Transport of New Jersey*, 233 NLRB 694, 694–695 (1977). "As a result, the Respondent had an obligation under Section 8(a)(5) and (1) to provide the names to the Union unless it could establish a valid defense for not doing so." *American Medical Response West*, supra. In the present case the Respondent asserts that it has a defense because it can establish a legitimate interest in confidentiality that outweighs the Union's need for the information. See *Detroit Edison v. NLRB*, 440 U.S. 301, 319–320 (1979); *Piedmont Gardens*, 362 NLRB 1135 (2015), enfd. in relevant part by 858 F.3d 612 (D.C. Cir. 2017): *Northern Indiana Public Service*, 347 NLRB 210, 211 (2006). The Respondent, as the party asserting this defense, bears the burden of proving that it had a legitimate and substantial confidentiality interest that outweighs the Union's need for the information. *Northern Indiana Public Service,* supra; *Lasher Service Corporation*, 332 NRLB 834, 834 (2000); *Geiger Ready Mix Co.*, 315 NLRB at 1021, 1021 fn. 2 (1994). Even if the Respondent is able to prove that it has a legitimate and substantial confidentiality interest that outweighs the Union's need for the information, it violates the Act by withholding the names without offering the Union an accommodation. *Borgess Medical Center*, 342 NLRB 1105, 1105–1106 (2004).

The Respondent has failed to establish a legitimate interest in

confidentiality, much less one that outweighs the Union's need for the information. On April 23, when the Respondent announced its refusal to supply the names of the 6 hourly employees, *the only reason* the Respondent gave was that the employees themselves had requested that the interviews be kept confidential. Now the Respondent admits that that stated justification was simply false. At trial, the Respondent stipulated that, contrary to the confidentiality interest it claimed when it announced its refusal to provide the information, not a single one of the 6 hourly employees had, in fact, requested confidentiality.

Subsequent to the April 23 announcement that it was refusing to provide the names, the Respondent asserted a different "interest in confidentiality"—i.e., that a recent incident showed "there is a significant risk" of "intimidation or harassment of witnesses." However, it is undisputed that this concern about retaliation was *not* a legitimate confidentiality interest on April 23 when the Respondent announced that it would not provide the information. During the trial, the Respondent admitted that at the time of its April 23 refusal it had no knowledge, or even a belief, that the Union or employees were retaliating against employees for cooperating with the investigation. The Respondent has failed to meet its burden of showing that when it refused to provide the names of interviewed employees on April 23 it had any legitimate confidentiality interest, much less that it had a confidentiality interest that was so substantial that it outweighed the Union's well-recognized need for witness names sought in connection with representing an employee in a grievance proceeding. *American Medical Response West*, supra, *Transport of New Jersey*, supra. For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) of the Act on April 23, 2018, when it refused the Union's April 16, 2018 request for the names of hourly employees who provided statements to the Respondent as part of the investigation of Williams' conduct.

The complaint alleges that the Respondent unlawfully refused to provide the requested names not merely on April 23, but *since* April 23. The violation that began when the Respondent unlawfully failed to provide that information on April 23 has not been remedied. The information unlawfully withheld is still being withheld and the Respondent has not posted an appropriate notice informing employees that it would not unlawfully withhold information from the Union in the future. To the extent that the Respondent has identified later-discovered concerns that it claims would have justified withholding the information at time subsequent to when it announced its refusal to provide the information, those later-discovered concerns cannot absolve the Respondent either of its earlier-committed violation or of the obligation to remedy that violation by, at a minimum, posting an appropriate notice to employees.

Even assuming that the information the Respondent obtained on April 26 and May 18 relating to Taborn bears on the extent to which the April 23 violation is continuing, I find that the reports regarding Taborn do not, in fact, show that the Respondent had a legitimate confidentiality interest. I note that Carr did not testify that the Respondent performed even the most cursory investigation of what Shanks reported regarding Taborn's claim about the treatment of his boots. Carr did not testify that he talked to Taborn about the boot incident or identified the date when incident is supposed to have occurred. There is no evidence that the Respondent delved into the matter further or otherwise treated the allegations about Taborn's boots as a serious or persistent issue. Given that it is the Respondent's burden to establish the defense based on a legitimate interest in confidentiality, *Lasher Service Corporation*, supra, and given that the Respondent has presented nothing beyond hearsay statements in the April 26 email from Shanks regarding the purported treatment of Taborn's boots, and nothing beyond speculation to tie any such treatment to the investigation, the Respondent's defense cannot be accepted. Moreover, given that the Respondent has not shown, or even claimed, that it treated the report regarding Taborn's boots as consequential enough to warrant investigation, it cannot persuasively argue that the report was so consequential as to override the Union's right to obtain information needed to represent a discharged employee in a grievance proceeding.

On May 18, Carr received an email from Taborn stating that the Union had removed him from his position as a union steward because Underhill "couldn't get past a steward" providing information against "another member," i.e., Williams. As with the Shanks email, Carr received this email from Taborn *after* he announced the Respondent's refusal to provide interviewees' names. And once again with respect to this matter, Carr did not testify that he investigated to determine the veracity or circumstances regarding this report from Taborn or otherwise handled it as one would a serious matter. At any rate, the Union's decision about who can best serve as a union steward to deal with the employer is an internal union matter that has no effect on the steward's employment relationship with the employer. An employer has very limited, if any, legitimate interest in a Union's decision regarding a purely internal union matter of this kind. See *NLRB v. Allis-Chalmers Mfg. Co*., 388 U.S. 175, 195 (1967) ("Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status."); *Office Employees Local 251 (Sandia National Loaboratories)*, 331 NLRB 1417 (2000) (same); *Laborers Local 721*, 246 NLRB 691, 693 (1979) (same), enfd. 649 F.2d 33 (1st Cir. 1981); see also *Local 254, Service Employees Local 254 (Brandeis University)*, 332 NLRB 1118, 1124 (2000) (a large number of internal union disputes could fairly be characterized as disputes about how best to deal with employers). Given the above, hearsay about the reasons for the Union's internal decision about who should serve as a union steward, does not provide the Respondent with a legitimate basis for withholding the witness names that the Union needed to represent Williams in the grievance proceeding regarding his discharge.

For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) since April 23, 2018, when it refused the Union's April 16, 2018 request for the names of the hourly employees who provided statements to the Respondent as part of the investigation of Williams' conduct.

B. Respondent's Delay in Providing Union with the Dates of Employee Interviews

The Complaint alleges that, in addition to violating Section 8(a)(5) by refusing to provide the Union with the names of the interviewed hourly employees, the Respondent violated Section 8(a)(5) because it unreasonably delayed providing the Union

with the dates of those interviews. The record shows that the Union requested the dates on April 16 and that the Respondent failed to provide that information until over 2-1/2 months later on July 2, 2018. An employer's "unreasonable delay in furnishing . . . information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Naperville Jeep/Dodge*, 357 NLRB 2252, 2252 fn. 5 and 2272–2273 (2012), enfd. 796 F.3d 31 (D.C. Cir. 2015), cert. denied 136 S.Ct. 1457 (2016); *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001).

Although the Respondent denies that the delay violated the Act, it does not claim either that the dates of the interviews were not relevant and necessary to the Union's representation of Williams in the grievance process or that the delay in providing the dates was justified by legitimate confidentiality concerns. Nor does the Respondent claim that gathering the information was so difficult or burdensome that 2-1/2 months was a reasonable amount of time in which to respond. Rather it argues that the delay was too short to constitute a violation, that its failure to promptly supply the information was an "oversight," and that the delay caused no prejudice to the Union. As is discussed below, none of the Respondent's arguments have merit.

Regarding the Respondent's argument that the delay here was too short in duration to constitute a violation, Board caselaw shows that, to the contrary, where, as here, the information requested by a union is not voluminous or difficult to gather, delays of 2-1/2 months or less are unreasonable and violate the Act. In such circumstances the Board has found delays of 2-1/2 months, 2 months, 7 weeks, and even a mere 6 weeks to be unreasonable and violative of the Act. *Dodge of Naperville Jeep/Dodge*, supra (2 months); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (7 weeks); *House of the Good Samaritan*, 319 NLRB 392 (1995) (2.5 months); *Bundy Corp.*, 292 NLRB 671, 672 (1989) (6 weeks). Given how minimal the information sought by the Union was, there is no apparent reason why the Respondent should not have been able to easily gather the dates of the six interviews in a day or less and the Respondent has not suggested otherwise. Under the circumstances, and Board precedent, the Respondent's delay of over 2-1/2 months was unreasonable and a violation of the Act.

As for the Respondent's contention that there was no violation because the delay was unintentional[6] and was not shown to have resulted in prejudice to the Union, I begin by noting that the precedent cited above does not require either improper intent or prejudice to establish a violation. Rather where, as here, a union requests information that is relevant and necessary to its representation of the bargaining unit and the employer unreasonably delays providing that information, a violation of Section 8(a)(5) is shown. *Naperville Jeep/Dodge*, supra; *Amersig Graphics,* supra; *Woodland Clinic*, supra. The Respondent seizes on an administrative law judge's passing reference to the absence of evidence of prejudice in *Union Carbide Corp.*, a case in which the Board found that the employer's delay in supplying information was not a violation. 275 NLRB 197, 200–201 (1985). However, that decision does not find that Union Carbide unreasonably delayed providing information but escaped a finding of violation because there was no prejudice. Rather Union Carbide's delay was not a violation because the delay *was reasonable*. Specifically, the delay in that case resulted because the information was "complex," "most difficult, time consuming, and expensive" to gather. Ibid. Unlike the Respondent in this case , the employer in *Union Carbide* began to gather the voluminous data at-issue within days of the Union's request and continued that effort without interruption until the information was provided. "There was simply no showing" that Union Carbide's effort to provide the information was "not reasonable or that [Union Carbide] could have done anything else to produce a faster result." Ibid. The relevant circumstances in the instant case could hardly be more different than those in *Union Carbide*. Here the information the Union sought was minimal, simple, and easily gathered. Indeed, withholding that information actually required the Respondent to expend additional effort by affirmatively redacting the dates from the information supplied on April 23 and 30. The Respondent, unlike the employer in *Union Carbide*, could have "produce[d] a faster result" by immediately providing the simple, minimal, information at issue.

The Respondent violated Section 8(a)(5) and (1) of the Act because it unreasonably delayed providing the Union with the dates of the employee witness interviews that the Union requested on April 16, 2018, and again on April 26, 2018.

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. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act on March 19 and 20, and April 3 and 5, 2018, when it directed employees interviewed as part of an investigation of a bargaining unit employee's conduct that the interviews were confidential and should not be disclosed to other employees and that the interviewees should decline to answer questions anyone posed to them about the interviews.

4. The Respondent violated Section 8(a)(5) and (1) of the Act since April 23, 2018, when it refused the Union's April 16, 2018, request for the names of the hourly employees who provided statements to the Respondent as part of the investigation of a bargaining unit employee's conduct.

5. The Respondent violated Section 8(a)(5) and (1) of the Act when it unreasonably delayed providing the interview dates that were requested by the Union on April 16, 2018, and again on April 26, 2018.

6. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

[6] I do not make a finding regarding whether or not the delay was the result of a mere "oversight" as Carr testified that he "thinks" it was. I do, however, note that the claim that the delay was simply an oversight is suspect given that that when Carr failed to provide that information in his initial response to the Union's April 16 request, the Union followed-up on April 26 with a more focused request that reiterated to Carr that the Union needed the interview date information it previously requested.

REMEDY

Having found that the Respondent 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. The Respondent contends that even if it violated the Act by refusing to provide the Union with the names of hourly employees who Carr interviewed, I should relieve it of the obligation to provide the unlawfully withheld information because the Union no longer needs it. The Respondent reasons that because the arbitral hearing regarding the Williams grievance was held on January 24 and 25, 2019, the Union's need for the information has passed. In *Boeing Co.*, 364 NLRB No. 24, slip op. at 4 (2016), the Board held that if an employer establishes that the union no longer has any need for requested information, "the Board will not order the employer to produce it, despite finding the violation." The Boeing decision notes that "the employer bears the burden of proof of establishing that the union has no need for the requested information." Ibid.

I find that the Respondent in this case failed to meet its burden of establishing that the Union no longer has any need for the unlawfully withheld information. While it is true that the arbitral hearing regarding the Williams grievance has been held, the Respondent has not established that the arbitrator has issued a decision, that no appeal has been taken from any such decision, and that the arbitrator has no authority to reopen the matter. Tellingly, in *Borgess Medical*, the one case that the Respondent cites where the Board relieved an employer of the obligation to provide unlawfully withheld information sought in connection with a grievance, the Board specifically relied on the fact that, not only had the arbitration been held, but that the arbitrator had already issued a decision and no appeal was taken from that decision. 342 NLRB at 1106, citing *Westinghouse Electric Corp.*, 304 NLRB 703 fn.1, 709 (1991) (employer not ordered to produce withheld information that was only relevant to an arbitration and that arbitration had closed and could not be reopened). In the instant case, by contrast, the Union still needs the information in order to evaluate how to proceed regarding the pending grievance, and possibly in order to represent Williams in an appeal, request for reopening, or other avenue that either party may choose to pursue before or after the arbitrator's decision. Therefore, I find that the Respondent has failed to meet the burden, under *Boeing*, "of establishing that the union has no need for the requested information" and I deny its request to be relieved of the obligation to provide the information it unlawfully withheld from the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[7]

ORDER

The Respondent, Alcoa Corporation, Newburgh, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully instructing employees not to discuss investigatory interviews with other employees and/or the employees' collective bargaining representative.

(b) Refusing to provide the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 (the Union) with requested information that is relevant and necessary to the Union's statutory duty as collective-bargaining representative.

(c) Unreasonably delaying the provision of information, requested by the Union, that is relevant and necessary to the Union's statutory duty as collective-bargaining representative.

(d) 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) Immediately provide the Union with the interviewee names it requested on April 16, 2018.

(b) Within 14 days after service by the Region, post at its facility in Newburgh, Indiana, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 25, 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 March 19, 2018.

(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. March 27, 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.

[7] 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.

[8] 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."

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 unlawfully instruct you not to discuss investigatory interviews with other employees or with your collective bargaining representative.

WE WILL NOT refuse to provide the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 (the Union) with requested information that is relevant and necessary to the Union's statutory duty as collective-bargaining representative.

WE WILL NOT unreasonably delay providing the Union with requested information that is relevant and necessary to the Union's statutory duty as collective-bargaining representative.

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

WE WILL immediately provide the Union with the interviewee names that the Union requested on April 16, 2018.

ALCOA CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-219925 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.