

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO, CA**

**LUSH COSMETICS, LLC**

**Case 20-CA-272392**

**AND**

**WORKERS UNITED  
CANADA COUNCIL, SEIU**

*Randy M. Girer, Esq.*, for the General Counsel.  
*Joel S. Aziere, Esq., Rob Buikema, Esq. (Buelow Vetter Buikema Olsen & Vliet)*, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

**DICKIE MONTEMAYOR, Administrative Law Judge.** This case was tried before me on November 9, 2021, via the Zoom for Government videoconferencing platform. Charging Party filed a charge on February 8, 2021, and an amended charge on May 3, 2021. A complaint was issued on May 11, 2021, and an amended complaint issued August 2, 2021. Respondent filed an answer to the complaint denying that it violated the Act. By order dated October 28, 2021, the Regional Director withdrew allegations related to paragraph 7 of the complaint. On December 14, 2021, the parties filed post hearing briefs. After considering the matter (including the submissions by both Respondent and General Counsel) and based upon the detailed findings and analysis set forth below, I conclude that Respondent violated the Act.

**FINDINGS OF FACT**

**JURISDICTION**

The complaint alleges, and I find that

1. (a) The charge in this proceeding was filed by the Charging Party on February 8, 2021, and a copy was served on Respondent by U.S. mail on February 9, 2021.  
(b) The first-amended charge in this proceeding was filed by the Charging Party on May 3, 2021, and a copy was served on Respondent by U.S. mail on May 4, 2021.
2. (a) At all material times, Respondent has been a limited liability company with places of business located throughout the State of California, including in San Francisco, and has been engaged in the retail sale of cosmetics.

(b) During the calendar year ending December 31, 2020, Respondent, in conducting its business operations described above in subparagraph 2(a), derived gross revenues in excess of \$500,000.

(c) During the calendar year ending December 31, 2020, Respondent, in conducting its business operations described above in subparagraph 2(a), purchased and received at its California facilities goods valued in excess of \$5,000 directly from points outside the State of California.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Tony Ybarra	-	Store Manager
Stephen Dynes	-	People & Culture Business Partner, West Region

#### **ALLEGED UNFAIR LABOR PRACTICES**

Maxwell Dolso-Morey was employed by Respondent from November 15, 2015, to July 2021, when he voluntarily left the company. He worked in the retail operations of the company beginning as a seasonal contract employee moving up to a sales associate, then an Operations Specialist and in 2017, he held the position of a floor leader, Respondent is a cosmetics company that manufactures, distributes, and directly sells products in retail locations in North America, Europe, Asia, and Australia.

Respondent maintains intranet sites for internal communications which are not accessible by the public. Respondent utilizes the sites to update employees on company policies products and announcements. Employees are required to log onto both websites daily to remain up to date with any employer announcements or informational posting. There are two separate sites. The first is called zipline. It is a site that only Respondent's officials can post on. The second is called the hive. Unlike zipline, the hive allows for communications by employees and between employees. The hive had a usage policy which employees were directed to follow which stated as follows:

The hive is an online space meant for communicating with one another. You're welcome to speak your mind- just remember to keep it respectful to one another. The hive is a space that welcomes and encourages thoughtful discussion around topics related to Lush, its people, and its values. We aim to foster a safe space for the entire Lush community. We welcome all respectful thoughts and musings, regardless of personal opinion. In all spaces on the hive, there is zero-tolerance for defamatory and/or personal attacks on anyone in the Lush community. All commenters on the hive are asked to observe these guidelines and to keep language and remarks within accordance of them. All users are expected to follow the instructions above; any violation of these policies and procedures may result in disciplinary action. (Resp. Exh. 1).

The usage policy also set forth what it described as “quick and easy” guidelines to maintain a safe and respectful hive for all Lushies as follows:

1. Keep it respectful.

Because we want the hive to be a positive and collaborative environment where you can always find accurate information, all employee activity will be monitored by the internal communications team. Inappropriate comments, and misinformation will be deleted.

2. Keep it Lush

We want the hive to be a place where employees can quickly and easily find relevant information for their jobs, so let’s not clutter it up with too many distractions! Please keep your comments related to the posts’ original topics. There are many places to share content about ourselves and our passions. Business posts on the hive should be a place where we talk about work.

3. Keep it secure.

All content on the hive is for employees’ eyes only, and subject to our confidentiality agreement. Please only access the hive from secure devices, and remember to log out when you are finished. (Resp. Exh. 1).

Dolso-Morey was aware of the acceptable use policy which he acknowledged electronically on June 23, 2019. (Resp. Exh. 6).

The employer also had in place an anti-harassment policy which Dolso-Morey was aware of. The policy stated as follows:

Lush prohibits harassment of any kind, including sexual harassment, and will take appropriate and immediate action in response to complaints or knowledge of violations of this policy. . . . Written or graphic material placed on walls, bulletin boards, e-mail, the hive or elsewhere Lush’s premises or circulated in the workplace that mocks, denigrates, or shows hostility towards an individual or group as outlined in the protected grounds/identities. (GC Exh. 11).

On August 16, 2020, in response to one of Respondent’s “Business Updates” regarding employee layoffs, Dolso-Morey posted a comment on the Hive under the topic “Lush Restructuring.”

This company doesn’t value tenured staff. They’d rather hire an outside manager to run the staff like the Target or Marshalls they came from instead of already knowing and understanding the culture of being a Lush employee. When a staff member has worked here for 6+ years gets furloughed but a manager who's only worked here for a little over a year gets a 25% pay reduction is unjust and cruel. Where is the equity in BID training from that? You’re vultures are taking

advantage of this PANDEMIC to “rearrange” people and lighten the financial burden on YOU. Without any thought of your loyal, unflinching staff that have put blood, sweat and tears into this company, literally! These layoffs are irredeemable and prove that you are CEO and businessman, before you’re a  
 5 working class person but let’s not forget that you will be totally fine with your Wolverton Security money. You’re a scumbag and the boot we are all supposed to lick. Congratulations, you’ve started a revolution you didn’t bargain for, Coward. (GC Exh. 2) (Resp. Exh. 5, p. 14).

10 On December 5, 2020, Dolso-Morey again posted on the hive under the topic of “Business Update from Mark Wolverton, CEO of Lush America” and the post read as follows:

The lack of solidarity and curiosity on this post is disheartening. When it comes to the environment, people’s right to vote, or shark “n soup we all come together and  
 15 sell our hearts out for these causes that we believe in. But for some reason when employees come together and talk about organizing themselves, they’re met with IMMEDIATE resistance and doubt. I love this company, it’s products, and my fantastic co-workers but I cannot for the life of me wrap my head around why being anti-union is the focus for so many. We are WORKING through the  
 20 pandemic. As a front facing retail employee, in a large city, I can confidently say that I am terrified of going to work and I can only imagine what manu is going through during holiday right now. I have nothing but love and support for them because they’re physically producing pro”t (sic) in working conditions that only they can describe because I only know the manicured version. Support and  
 25 appreciate them because they are essentially the ones paying your pay check. But don’t just appreciate them for doing the dirty physical work but for having the courage to organize and take matters into their own hands. There is nothing more important RIGHT NOW than the labor movement because all of the things we all care deeply about are tied to the labor movement. From the environment to  
 30 people’s right to vote, and to shark “n soup it’s all interconnected. So please have some empathy and try to critically analyze and question the response the company is having/going to have. From sales in San Francisco to manu in Vancouver and across Canada, we stan a queen. (GC Exh. 3).

35 On December 8, 2020, Mark Wolverton posted a response to the comments that were received on the “Business Update” thread. It read as follows:

I thought it appropriate to post a few thoughts on this thread.  
 On December 3rd, Karen and I posted an update to thank everyone for their hard  
 40 work and recognize the effort and stress you all are going through with this unprecedented pandemic. A conversation on unions in Toronto followed my post, which I did not intend. Regrettably, I have noticed that the hive has become a place where attacks are common, the conversation or comments sometimes negative and I am learning that some employees are choosing not to visit it due to  
 45 this inappropriate sentiment. Although we encourage healthy debate and dialogue, Karen and I do not condone disrespectful behavior and comments, or posting falsehoods or statements which are designed to mislead staff. We are both very

concerned with this trend and are working diligently to get our company and the hive back to our vision where it was not long ago. Over the past several months, there have been some posts that have attacked our company, our ethics and our integrity. In addition, there are posts that contain very significant inaccuracies. Although this has not been sitting well with us, it is important that our conversations continue. The hive was established to provide an open forum to share thoughts and ideas about work, and it must be a place where we can trust what is presented. As a result, we will directly reach out to an employee to address and any false statements, understand why they were made, and work to ensure correct information replaces it. We remain committed to maintaining a lively forum but will work to ensure it is also civil. We ask everyone to keep their comments relevant, respectful and truthful. (Resp. Exh. 5).

On December 21, 2020, Dolso-Morey under the topic of “International Migrants Day” posted on the hive. This post read as follows:

Y’all should find a org that supports Canadian immigrants that work in warehouses. Whoops! Never mind, that’d be totally against your own interests. Before you stand on your soap box, pay your workers a livable wage. STARTING with your immigrant workers in your own company. Support your workers trying to join a #union to avoid shooting yourself in the foot because your public image is what you think is holding up this company. (Resp. Exh. 5).

On January 8, 2021, Dolso- Morey posted under the topic of It’s Our Democracy on the hive as follows:

Y’all wanna talk about fragile democracy? Stop harassing employees who want to participate in the DEMOCRATIC process of joining a union. Please, please get off of your SOAPBOX. You know what helps more than mental health day? Being paid a livable wage so we don’t have to worry about the next check being half of what we need for rent/utilities/medical expenses/food. Wait, that’s all supposed to be covered with an extra \$1 and a one time payment of \$300. You’re (sic) grapevines are getting thinner and thinner with little to no fruit. (Resp. Exh. 5).

On January 6, 2021, Stephen Dynes, Respondent’s west coast human resources official issued a letter addressed to Dolso-Morey regarding his “conduct related to posts on the hive.” (GC Exh. 7). The letter at Dynes’ direction was delivered to Dolso-Morey by Shop Manager Tony Ybarra in a closed door meeting where only he and Dolso-Morey were present. At the closed door meeting Ybarra handed Dolso-Morey the letter. Ybarra was instructed to present the letter to Dolso- Morey “allow him to read it and then allow him to—if he had any questions, put him in the right direction of whoever he needed to talk to.” (Tr. 157). The letter provided as follows:

This letter concerns your continuing conduct related to posts on the hive. To ensure that this letter is not misconstrued, we are specifically advising that it does not constitute discipline. Rather, we intend to ensure that you are aware of the Company’s

expectations and assist you in not engaging in misconduct the future. On December 19th, you made posts on the hive which appear to be intended to disparage the Company and its managers by implying, without any substance, that Lush is mistreating Manufacturing employees along with a unsubstantiated claim that “public image is what is holding up this company”. This is in addition to your August 19th hive post in which you described Mark Wolverton as a “scumbag” and “a boot we are supposed to lick”. Your conduct in posting unsubstantiated allegations and personally insulting comments on the hive is not acceptable. If your intention is actually to have your complaints or concerns addressed, that intention cannot be served in this manner. The Company is committed to investigating and responding to all complaints and other reports that are brought forward in good faith. If you have a specific complaint or concern that you wish to bring to Lush’s intention, it is asked that you speak directly with your manager or utilize either [opendoor@lush.com](mailto:opendoor@lush.com) or [workinghere@lush.com](mailto:workinghere@lush.com). In the future, we ask you to refrain from making unsubstantiated allegations or personal insults on the hive. If you elect to continue such inappropriate conduct, the Company may consider your actions to amount to misconduct. For purposes of further clarity, you may continue to express your views concerning unionization on the hive. Given the original spirit of the hive, the Company has permitted the hive to be utilized to share views respecting unionization. It intends to continue to do so, as long as the discourse is professional and that it doesn’t, again, cross the line into insubordination, the making of misrepresentations or potentially libelous statements concerning the Company or against any individuals. Finally, we would also ask you to seriously consider the adverse effects that the making of unsubstantiated allegations and insulting comments, including to the approximately 4600 users of the hive, can have on the Company and on all of its employees. We hope that this is clear. Please contact me if you have any questions.

Ybarra handed him the letter, told him to take some time to read it, and asked if he had any questions. After reading the letter, Dolso-Morey “chatted back and forth for a little bit” then there were no questions about the letter so they both went about their day. (Tr. 160). The “chat” revolved around books, videos, and movies about unionizing which Dolso-Morey recommend as resources to educate Ybarra about the topic. (Tr. 161).

## Analysis

### 1. The prohibition against making “unsubstantiated allegations” on the hive

At the outset it is important to point out that the General Counsel’s complaint paragraph 5 is narrowly drawn to allege only that the instruction against making unsubstantiated allegations violates the Act. It does not challenge the lawfulness of the employer’s rule or policy as it relates to prohibitions against “personally insulting statements.” It is also important to note that the basic facts surrounding this allegation are undisputed.

Section 8(a)(1) of the NLRA states that it is an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of” their organizing rights. 29 U.S.C. § 158. Maintenance of even a facially neutral workplace rule can violate Section 8(a)(1) where the rule is overbroad. To assess overbreadth, the Board asks whether a facially neutral rule, “when

reasonably interpreted, would potentially interfere with the exercise of NLRA rights.” *Boeing*, 365 NLRB No. 154 (2017). If a rule “would *not* prohibit or interfere with the exercise of NLRA rights, maintenance of the rule is lawful without any need to evaluate or balance business justifications, and the Board’s inquiry into maintenance of the rule comes to an end.” *Id.* at 16. If it *would* prohibit or interfere with the exercise of NLRA rights, the Board then balances “the nature and extent of the potential impact” on those rights against the “legitimate justifications associated with the rule.” *Id.* at 3. “[T]he rule’s maintenance will violate Section 8(a)(1) if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7.” *Id.* at 16.

Applying the law to the undisputed facts, I find that the rule is overbroad under the Board’s established standards. The term “unsubstantiated allegations” by its very terms is vague ambiguous and unclear. A reasonable employee would not know what could or could not be posted. What is not ambiguous when viewed objectively is that the rule carries with it the threat of discipline. This is by its own terms coercive. Any reasonable employee when presented with a prohibition attached to which is a threat of discipline would reasonably interpret it as coercive. In Dolso-Morey’s case, Respondent’s specific aim was to coerce him into not posting about the alleged disconnect between the company’s stated values and its treatment of migrant workers. This translates directly into interference under Section (8)(a)(1).

The second prong of the analysis requires balancing the employers “legitimate justifications” of the rule against “the extent of the potential impact.” I find that given the degree of overbreadth and ambiguity of the rule, it could subject an employee to discipline for nearly any critical comment regarding terms and conditions of employment. In Dolso-Morey’s case, he testified that some of his concerns were formed from reading published news articles. (GC Exh. 8, 9, 10). Presumably a regular employee would be tasked to take on the extraordinary role to investigate beyond published news articles and establish the absolute truth of any concern or face discipline if the employer disagreed with the contents of the communication. The “extent of potential impact” is broad. Respondent has offered no legitimate justifications which would balance the vague and ambiguous policy and its “extent of potential impact” against employees and in its favor. I find that the prohibition against “unsubstantiated allegations” violated Section 8(a)(1) of the Act.

## **2. The alleged interrogation and preview of employee comments by Tony Ybarra**

General counsel in its complaint alleged that Tony Ybarra both interrogated Dolso-Morey and instructed him to allow Ybarra to review any comments before posting on the hive. Only two people were present during the alleged violations, and each offered a different version of events. The resolution of the question is entirely dependent on whose version of events is believed to be credible. I credit the testimony of Ybarra over that of Dolso-Morey as being a more accurate depiction of the events in question. The accuracy of Dolso-Morey’s testimony was called into question more than once. For example, he was unable to recall what Ybarra allegedly said to him at the meeting regarding his hive posts. (Tr. 106). He also testified that he never read or reviewed the hive usage policy. However, the electronic record showed that he had both opened the document and acknowledged that he read and received it. (Resp. Exh. 6, Tr. 176–178). Ybarra’s testimony was credited for a number of reasons. Overall, his calm

demeanor and his openness while testifying suggested that he was being truthful. His testimony was logically consistent with established facts. He testified that he was delivering a letter that he was not the author of, and his job was to deliver the letter and “point him [Dolso-Morey] in the right direction” if he had any questions. (Tr 158). This is logically consistent with his  
 5 description of the conversation as someone merely serving as a messenger and not the author of the letter. Since there were no witnesses to the conversation, Ybarra could easily have denied any mention of unionization. He didn’t. Instead, he described the conversation as follows:

Q When you said you chatted back and forth, what did you chat about?

10 We talked about -- Max had mentioned some books, videos, movies that I should watch revolving unionizing -- somehow we'd gotten on that conversation. I let him know that I was no -- almost not educated at all about it. Max was always -- definitely the person in the store that was an educational figure, so I think he took the opportunity to just, you know, keep me educated and give me some resources  
 15 and tools if I needed them. And then I also offered my service as resources and tools back to him.

This portion of Ybarra’s testimony was particularly convincing because it offered a glimpse into the tone and character of the discussions. It is also important to note that the conversation  
 20 regarding unionization was initiated by Dolso-Morey not Ybarra. (Tr. 105). An interrogation violates Section 8(a) (1) when under all the circumstances, the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Healthcare Center*, 330 NLRB 935 (2000). There is nothing regarding the conversation that took place as  
 25 described by Ybarra that would “reasonably tend to coerce.” This is especially true since the topic of unionization was initiated by Dolso-Morey. (Tr. 105). See *Phillips-Van Heusen Corp.*, 165 NLRB 1 (1967) (finding conversation between manager and employees, a normal response to a discussion employees themselves initiated and not violative of Section 8(a)(1)).

30 The General Counsel alleged that Ybarra instructed Dolso-Morey to review all of his posts before posting on the hive. Ybarra denied that he ever gave this instruction. He testified:

I think it's important to know I was managing two shops in San Francisco, two large high  
 35 traffic stores. It was my first time doing it ever for the business. There's no way I would have been able to do any of those things. Even if I, you know -- whatever, I -- I -- there's -- I didn't have the time. I barely had the time to give the developments to the people that I wanted, the quality of development I wanted. There was no way I would have wanted to invest time or energy into babysitting Max. You know, I wouldn't have prioritized that over anything else. (Tr. 167).  
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I found this testimony credible. It is supported by the fact that after the meeting, Dolso-Morey continued to post on the hive without any input by Ybarra.

45 In view of the above findings, the allegations regarding paragraph six of the complaint are hereby dismissed.



### CONCLUSIONS OF LAW

1. Respondent's actions surrounding its creation of a work rule regarding "unsubstantiated allegations" which threatened an employee with unspecified reprisals violated Section 8(a)(1) of the Act.

2. Respondent did not interrogate or request to review Dolso-Morey's hive posts and thus did not violate Section 8(a)(1).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

### ORDER

The Respondent, Lush Cosmetics, LLC its officers, agents, successors, and assigns, shall

1. Cease and desist from engaging in the following conduct

(a) Making and enforcing overbroad work rules regarding "unsubstantiated allegations" and threatening employees with unspecified reprisals regarding such.

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

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Rescind the overbroad rule.

(b) Within 14 days after service by the Region, post at its facility in San Francisco, California, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by Respondent, and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted including the Respondent's Intranet known within the company as "the hive".

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 that facility at any time since February 9, 2021.

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<sup>1</sup> 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.

(c) Within 21 days after service by the Region, file with the Regional Director of Region 20 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with the provision of this Order.

5 Dated, Washington, D.C. March 24, 2022

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A handwritten signature in black ink, appearing to read 'Dickie Montemayor', written over a horizontal line.

**Dickie Montemayor**  
**Administrative Law Judge**

**APPENDIX**  
**NOTICE TO EMPLOYEES**  
**POSTED BY ORDER OF THE**  
**NATIONAL LABOR RELATIONS BOARD**  
**AN AGENCY OF THE UNITED STATES GOVERNMENT**

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

**FEDERAL LAW GIVES YOU THE RIGHT TO**

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

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT threaten you with reprisals because you engaged in activities protected by the National Labor Relations Act.

**YOU HAVE THE RIGHT** to talk about your own and other employees' working conditions, and WE WILL NOT stop you from talking about such matters.

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

**LUSH COSMETICS, LLC**

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov)  
901 Market Street, Suite 400, San Francisco, CA 94102-1735  
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/20-CA-272392](http://www.nlr.gov/case/20-CA-272392) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE  
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY  
OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE  
WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S  
COMPLIANCE OFFICER (628) 221-8875.