Stericyle, Inc. *and* Teamsters Local 628. Cases 04–CA–137660, 04–CA–145466, 04–CA–158277, and 04–CA–160621

January 6, 2022

NOTICE AND INVITATION TO FILE BRIEFS

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, RING, WILCOX, AND PROUTY

The National Labor Relations Board has decided to invite briefs from the parties and interested amici to consider whether the Board should adopt a new legal standard to apply in cases where an employer's maintenance of a facially-neutral work rule is alleged to violate Section 8(a)(1) of the National Labor Relations Act.

This case is pending before the Board on the Respondent's exceptions to the supplemental decision of Administrative Law Judge Michael A. Rosas, issued on September 4, 2020. The administrative law judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining work rules that addressed (1) "personal conduct," (2) "conflicts of interest," and (3) "confidentiality of harassment complaints."[1] In making his findings, the judge applied the standard established by the Board in *Boeing Co.*, 365 NLRB No. 154 (2017), as well as subsequent decisions applying the *Boeing* standard, including among others *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144, (2019), *Motor City Pawn Brokers*, 369 NLRB No. 132 (2020), and *G&E Real Estate Management Services d/b/a Newmark Grubb Knight Frank*, 369 NLRB No. 121 (2020).

The legal standard to be applied when an employer's work rule is alleged to be unlawful on its face presents an important, recurring issue under the Act. In adopting a new standard, which was later refined in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019), the *Boeing* Board reversed well-established precedent sua sponte and acted without the benefit of first seeking public participation. Given the ubiquity of employer work rules and the importance of ensuring that such rules do not interfere with the exercise of employees' rights under Section 7 of the Act any more than is justified by legitimate employer interests, the Board believes that it is appropriate, with public participation, to evaluate the standard adopted in *Boeing*, revised in *LA Specialty Produce*, and applied in subsequent cases.[2]

Accordingly, the parties and interested amici are invited to file briefs addressing the following questions:

1. Should the Board continue to adhere to the standard adopted in *Boeing Co.*, 365 NLRB No. 154 (2017), and revised in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019)?

2. In what respects, if any, should the Board modify existing law addressing the maintenance of employer work rules to better ensure that:

   (a) the Board interprets work rules in a way that accounts for the economic dependence of employees on their employers and the related potential for a work rule to chill the exercise of Section 7 rights by employees;

[1] The "personal conduct" rule provides in relevant part that:

> In order to protect everyone's rights and safety, it is the Company's policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.
>
> The following are some examples of infractions, which could be grounds for corrective action up to and including termination, however, this list is not all-inclusive.… Engaging in behavior which is harmful to Stericycle's reputation….

The "conflicts of interest" rule provides in relevant part:

> Stericycle will not retain a team member who directly or indirectly engages in the following:
>
> –An activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management.

The "confidentiality of harassment complaints" rule provides in relevant part:

> Stericycle strictly prohibits unlawful retaliation against any team member or applicant for employment who reports discrimination or harassment, or who participates in good faith in any investigation of unlawful discrimination or harassment.
>
> What action should you take if you feel you have been a victim of harassment or retaliation?

If you believe you have been the victim of harassment or retaliation of any kind, immediately do the following:

1. If you feel comfortable doing so, we encourage you to tell the person in no uncertain terms to stop; and
2. Report the incident and name of the individual(s) involved to your Human Resources Representative. If you cannot report the issue to your Human Resources Representative for any reason, contact the Team Member Help Line at [phone number]. The Help Line accepts anonymous complaints of any kind.

All complaints will be promptly investigated.

All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

[2] Our dissenting colleagues defend the *Boeing* Board's sua sponte reversal of the test announced in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004)—the test the Board had applied for 13 years to evaluate work rules alleged to be facially unlawful. *Boeing* was decided (and subsequently revised) without ever issuing a notice and invitation to file briefs. We believe issuing this notice prior to considering any change in the law is the better course.

Beyond that, addressing their arguments would be premature. Member Wilcox and Member Prouty were not members of the Board when *Boeing, LA Specialty*, and the other decisions identified here were issued.

(b) the Board properly allocates the burden of proof in cases challenging an employer's maintenance of a work rule under Section 8(a)(1); and

(c) the Board appropriately balances employees' rights under Section 7 and employers' legitimate business interests?

3. Should the Board continue to hold that certain categories of work rules—such as investigative-confidentiality rules as addressed in *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144, (2019), nondisparagement rules as addressed in *Motor City Pawn Brokers*, 369 NLRB No. 132 (2020), and rules prohibiting outside employment as addressed in *Nicholson Terminal & Dock Co.*, 369 NLRB No. 147 (2020), and *G&E Real Estate Management Services d/b/a Newmark Grubb Knight Frank*, 369 NLRB No. 121 (2020)—are always lawful to maintain?

Briefs not exceeding 20 pages in length shall be filed with the Board in Washington, D.C., on or before March 7, 2022. The parties (but not amici) may file responsive briefs on or before March 22, 2022, which shall not exceed 30 pages in length. No other responsive briefs will be accepted. Motions for extensions of time in which to file briefs will not be granted absent compelling circumstances. The parties and amici shall file briefs electronically by going to www.nlrb.gov and clicking on "E-Filing." The parties and amici are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/04-CA-137660. If assistance is needed in E-filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Executive Secretary Roxanne L. Rothschild at 202-273-1940.

Dated, Washington, D.C. January 6, 2022

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS KAPLAN AND RING, dissenting.

More than 75 years ago, the Supreme Court held that the Board cannot blindly enforce the rights of employees under Section 7 of the Act without regard to employers' legitimate interests. Because "[o]pportunity to organize and proper discipline are both essential elements in a balanced society," the Court held that the Board's task is to "work[] out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation v. NLRB*, 324 U.S. 793, 797–798 (1945). And the Court has reiterated this principle repeatedly in subsequent decisions.[1]

The Board used to respect this principle when assessing workplace rules. For example, in *Waco, Inc.*, 273 NLRB 746 (1984), the Board held that "[i]n assessing the lawfulness of [an employer's] rule, . . . we must determine whether the rule reasonably tend[s] to coerce employees in the exercise of their Section 7 rights, and, if so, whether the employees' Section 7 rights are outweighed by any legitimate and substantial business justification for the rule." Id. at 748; see also *Scientific-Atlanta*, 278 NLRB 622, 625 (1986) (recognizing that "Section 7 rights may be outweighed by an employer's substantial and legitimate business justifications").

Subsequently, the Board decided two cases that ultimately resulted in a new standard, often referred to as the "*Lutheran Heritage* standard," for determining whether an employer's maintenance of a specific rule violated employees' Section 7 rights.[2] Although the new standard did not expressly reference employers' interests, it is clear that, in both cases—*Lafayette Park Hotel* and *Lutheran Heritage Village*—the Board took employers' legitimate interests into account in applying the new standard.[3] The

[1] See, e.g., *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (finding that the Board had correctly performed the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967) (describing the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) (weighing employer's justification for shutting down plant against employees' right to bargain over decisions affecting their employment because "the Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved").

[2] In *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), the Board announced that the "appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." Id. at 825. And in *Lutheran Heritage Village–Livonia*, 343 NLRB 646 (2004), the Board announced a three-pronged standard, including, as relevant here, whether employees "would reasonably construe the language" of a rule "to prohibit Section 7 activity." Id. at 647.

[3] For example, in upholding a rule prohibiting disclosure of "Hotel-private information," the *Lafayette Park Hotel* decision explained: "Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information. Although the term 'hotel-private' is not defined in the rule, employees in our view reasonably would understand that the rule is designed to protect that interest rather than to prohibit the discussion of their wages." 326 NLRB at 826. And the *Lutheran Heritage* Board—rejecting the dissent's view that employees would interpret a rule prohibiting "abusive or profane language" to interfere with Sec. 7 activity—said: "[R]easonable employees would not read the rule in that way. They would realize the lawful purpose of the challenged rules.

Board also expressly rejected the notion that a rule is unlawful merely because it "could conceivably be read to cover Section 7 activity."[4] Disagreeing, the dissenters in those cases took the position that overbreadth alone makes maintaining a workplace rule violative of the Act.[5] But this was, after all, the dissenting view.

Somewhere along the line, however, a Board majority saw fit to adopt this dissenting view, without bothering to overrule *Lutheran Heritage*. And with that, the Board became the federal employee-handbook police. Seeking out and scrutinizing employer rules, policies, and handbook provisions for possible violations of the Act,[6] the Board applied a single-minded standard that not only failed to "work[] out an adjustment" between employees' and employers' rights, as the Supreme Court had directed, it failed to take the employer's legitimate interests into account at all. Rather, the sole inquiry for determining the legality of a challenged, facially neutral workplace rule was whether an employee "would reasonably construe" it to prohibit or otherwise chill potential Section 7 activity. By "would," the Board really meant "could." And by "employee," the Board really meant a majority of its members administering the Act remote from the workplace. In its chosen role as arbiter of all workplace rules, policies and handbooks, the Board found rules violative of the Act if there was *any* way they might be read to interfere with the exercise of employees' Section 7 rights. Few rules could withstand scrutiny under the test.

The Board's myopic attempt to interpret an infinite variety of workplace rules solely through the prism of Section 7 rights resulted in an incoherent body of caselaw containing arbitrary distinctions; a rule in one case would be held to violate the Act, and a nearly identical rule in the next case would be found lawful. Absent predictable results, and with the Board invalidating any rule that failed to avoid possible NLRA overlap, employers struggled to establish legitimate work rules. Employees likewise suffered from the lack of clear guidance regarding standards of conduct in the workplace. The number of work-rules cases at the Board ballooned,[7] creating unnecessary litigation and diverting Board resources from carrying out the Board's core mission: ensuring free and fair elections and adjudicating unfair labor practices.

The Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017), aimed to clean up this mess. It set forth a new framework that affirmatively recognizes the Board's duty to weigh both employee rights and employer interests, as directed by the Supreme Court. The *Boeing* framework requires that the Board interpret challenged rules from "the standpoint of reasonable employees" rather than that of "traditional labor lawyers."[8] Importantly, this new framework provides what the pre-*Boeing* approach did not: "certainty beforehand" that maintaining any particular workplace rule would not be found an unfair labor practice.[9] Together, *Boeing* and *LA Specialty Produce*—which clarified *Boeing*, and which the majority also has in its crosshairs—brought balance and predictability into the Board's rules-maintenance jurisprudence. This framework should be preserved, and neither *Boeing* nor any of the cases tied to *Boeing* that the majority has signaled their likely intent to overrule should be revisited. Accordingly, we dissent from the majority's decision to reconsider *Boeing* and cases applying it.

I. THE BOARD SHOULD NOT RECONSIDER *BOEING*

A. Boeing Implements the Mandate of Republic Aviation

Boeing faithfully implements the Supreme Court's directive that the Board consider employers' legitimate interests when enforcing Section 7 rights, and specifically, that we "work[] out an adjustment" between employees' rights under the Act and the employer's right to maintain discipline in the workplace. *Republic Aviation v. NLRB*, 324 U.S. at 797–798. Between the extremes of rules that

That is, reasonable employees would infer that the Respondent's purpose in promulgating the challenged rules was to ensure a 'civil and decent' workplace, not to restrict Section 7 activity." 343 NLRB at 648.

[4] *Lutheran Heritage*, 343 NLRB at 647 ("Where . . . the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.")

[5] See *Lafayette Park Hotel*, 326 NLRB at 833 (Members Fox and Liebman, dissenting in part) ("Even if the rule was established for legitimate business purposes, . . . it is not drafted so as to clearly define what is proscribed and eliminate any ambiguity as to whether protected activity is covered."); *Lutheran Heritage*, 343 NLRB at 649 (Members Liebman and Walsh, dissenting in part) ("[A] rule that prohibits, inter alia, unprotected behavior may be unlawful if it also contains prohibitions so broad that they can reasonably be understood as encompassing protected conduct.").

[6] See "Report on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section," GC Memo 15-05, at 15 (March 18, 2015), reporting General Counsel Griffin's responses to questions about regional investigative processes: Question: "Is there a uniform policy on requesting employers to produce entire employee handbooks when a pending charge pertains to only certain provisions of the handbook?" Answer: "Yes, when documents, such as employee handbooks and/or work rules are relevant to an investigation, Regions are instructed to obtain copies of these documents, rather than relying on excerpts that the parties may have submitted." Question: "When the Region is reviewing a charge alleging that a specific provision of an employee handbook is unlawful, does the Region affirmatively look for other potentially unlawful provisions?" Answer: "No, but, if in examining such documents to investigate alleged violations, the Region notices unalleged provisions that may be facially unlawful, Regions are instructed to bring this potential issue to the attention of the Charging Party, who may amend the charge or file a new charge . . . ."

[7] From the 2004 issuance of *Lutheran Heritage* until 2010, when members appointed by a Democratic administration assumed the majority, the Board issued approximately 8 rules-maintenance decisions. During the Democrat-majority years of 2010 to 2017, the Board issued 27 such decisions. See *Boeing*, 365 NLRB No. 154, slip op. at 11–12 fn. 51. This number, however, fails to capture the many cases alleging rules-maintenance violations that settled after charges were found meritorious. See "Report of the General Counsel Concerning Employer Rules," GC Memo 15-04 (March 18, 2015) (discussing 57 rules the GC had deemed unlawful).

[8] *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 1 (2019).

[9] See *First National Maintenance Corp. v. NLRB*, 452 U.S. at 678–679 (stating that management "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice").

are categorically lawful to maintain because employees would not reasonably interpret them to interfere with their rights, and rules that are categorically unlawful to maintain because employees would so interpret them and the interference with employee rights clearly outweighs any legitimate employer interest, *Boeing* recognizes a middle ground: rules that are lawful to maintain, notwithstanding that they are somewhat overbroad, because any tendency to interfere with the exercise of a Section 7 right is outweighed by the legitimate employer interests served by those rules. Thus, under the *Boeing* framework, the Board "work[s] out an adjustment" by considering both employee rights and employer interests.

Boeing overruled *Lutheran Heritage Village*, supra. As the Board in *Boeing* explained, *Lutheran Heritage*—as it came to be applied—was contrary to the Supreme Court's directive in *Republic Aviation* because it did not permit *any* consideration of the legitimate justifications underlying an employer's rule, policy or handbook provision. Specifically, *Boeing* replaced the well-intended but misapplied "reasonably construe" prong of the *Lutheran Heritage* standard, under which a rule was unlawful to maintain if employees "would reasonably construe [its] language to prohibit Section 7 activity."[10] The *Lutheran Heritage* decision made it abundantly clear that mere ambiguity does not make a facially neutral rule unlawful under this standard. Where a "rule does not refer to Section 7 activity," the Board held, "we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way."[11] In defiance of this clear holding, and deviating from the Court's clear direction in *Republic Aviation,* the Board in subsequent cases turned "would" into "could" by applying the principle that ambiguity is to be construed against the drafter, a principle invoked by the dissent in *Lutheran Heritage*, not the majority.[12]

Consistent with Supreme Court precedent, the *Lutheran Heritage* decision also made clear that the analysis of challenged rules must accommodate employers' legitimate reasons for maintaining them. For example, in finding rules prohibiting profane or abusive language lawful to maintain, the *Lutheran Heritage* decision relied in significant part on the fact that the rules served "legitimate business purposes: they are designed to maintain order in the workplace and to protect the [r]espondent from liability."[13] Subsequently, however, the Board concluded that employers' legitimate interests are not impaired by holding workplace rules unlawful on the sole basis that they are ambiguous because employers are free to "adopt a more narrowly tailored rule that does not infringe on Section 7 rights"[14]—a principle *also* invoked by the dissent in *Lutheran Heritage*, not the majority.[15] Moreover, application of the *Lutheran Heritage* "reasonably construe" standard, over time, generated an incoherent body of precedent notorious for its opacity.[16]

Overbreadth alone should not condemn a workplace rule. That is, if a rule is not drafted narrowly enough to avoid any possible ambiguity about its effect on Section 7 rights, that overbreadth alone ought not invalidate the rule. The Board must also consider the legitimate interests the rule serves. The Court's command in *Republic Aviation* to "work[] out an adjustment" between employee rights and employer interests cannot be met by simply requiring that an employer narrowly tailor its rules to avoid any possible infringement on Section 7 rights, as has been suggested.[17] *Republic Aviation* still requires the Board to balance a rule's tendency to interfere with the exercise of Section 7 rights against the employer's legitimate reasons for maintaining the rule. Demanding that employers draft a more narrowly tailored rule assumes that it is humanly possible to craft workplace rules that eradicate every last vestige of ambiguity. *Boeing* rests in part on the principle that it is not.[18]

In sum, *Boeing* gives real and substantial weight to the Board's obligation to "work[] out an adjustment" between employee rights and employer interests,[19] and there is every reason to believe that the standard to come will not.

[10] *Lutheran Heritage*, 343 NLRB at 647.

[11] Id. (emphasis in original).

[12] Id. at 650 (Members Liebman and Walsh, dissenting) ("[W]e find that the challenged rules are facially ambiguous. The Board construes such ambiguity against the promulgator."). See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1690 (2015); *Sheraton Anchorage*, 362 NLRB 1038, 1038–1039 fn. 4 (2015); *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012) ("Board law is settled that ambiguous employer rules—rules that reasonably *could* be read to have a coercive meaning—are construed against the employer" (emphasis added).), enfd. 746 F.3d 205 (5th Cir. 2014); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 870 (2011), enfd. in part 805 F.3d 309 (D.C. Cir. 2015).

[13] *Lutheran Heritage*, 343 NLRB at 647.

[14] *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 5 (2016).

[15] See *Lutheran Heritage*, 343 NLRB at 652 (Members Liebman and Walsh, dissenting) ("Although we agree with our colleagues and the District of Columbia Circuit that employers have a legitimate interest in protecting themselves by maintaining rules that discourage conduct that might result in employer liability, . . . that interest is appropriately subject to the requirement that employers articulate those rules with sufficient specificity that they do not impinge on employees' free exercise of Section 7 rights.").

[16] See *Boeing*, 365 NLRB No. 154, slip op. at 11 fn. 50 (citing commentaries criticizing the Board's application of *Lutheran Heritage*'s "reasonably construe" standard as "seem[ing] to run counter to any balanced reading of the NLRA" and "far from intuitively obvious," among other critiques).

[17] Then-Member McFerran joined her colleagues in the majority in stating that an employer may "protect his legitimate business interests" by "adopt[ing] a more narrowly tailored rule that does not infringe on Section 7 rights." *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 5. This remains Chairman McFerran's settled conviction. See *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 9 (2021) (Chairman McFerran, dissenting): "*Boeing*'s fundamental flaw is that it permits employers to maintain rules that reasonably tend to chill employees in the exercise of their rights under the Act, *while failing to require that employers narrowly tailor their rules to serve demonstrated, legitimate interests*" (emphasis added). Notably, the Board never provides the narrower version of the rule that would pass muster. It merely finds the existing rule unlawfully overbroad and orders it rescinded or revised, leaving the employer to either try, and likely fail, once again or to give up on the rule altogether.

[18] See *Boeing*, 365 NLRB No. 154, slip op. at 2, 9.

[19] *Republic Aviation v. NLRB*, 324 U.S. at 797–798. There is nothing revolutionary in *Boeing*'s insistence that employee rights be balanced

B. Under Boeing and LA Specialty Produce, Rules are Interpreted from the Proper Point of View

In *LA Specialty Produce*, the Board accurately diagnosed a key shortcoming in the way the Board had applied *Lutheran Heritage*'s "reasonably construe" standard:

> In case after case, [the Board] invalidated commonsense rules and requirements that most people would reasonably expect every employer to maintain. In doing so, the Board viewed challenged rules not from the standpoint of reasonable employees, but from that of traditional labor lawyers who have devoted their professional lives to interpreting and applying the NLRA. And it outlawed rules and policies based on its judgment that such rules could have been written more narrowly to eliminate potential interpretations that might conflict with the exercise of Section 7 rights—interpretations that might occur to an experienced labor lawyer but that would not cross a reasonable employee's mind.[20]

Boeing, as clarified by *LA Specialty Produce*, shifted the perspective from which rules are viewed to that "of an objectively reasonable employee who is 'aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job.'"[21] Such an employee "'does not view every employer policy through the prism of the NLRA,'" as the Board did when applying the "reasonably construe" standard.[22] Shifting the perspective from the ivory tower to the workplace floor, the Board under *Boeing* stopped invalidating rules "merely because [they] could be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity, or because the employer failed to eliminate all ambiguities from the rule, an all-but-impossible task."[23]

Although this was framed as a rejection of *Lutheran Heritage*, in reality *Boeing* represented a rejection of the way that decision had come to be applied, which followed the *Lutheran Heritage* dissent, not the majority decision. The *Lutheran Heritage* decision did not conclude that a reasonable employee would read a challenged rule to prohibit Section 7 activity "simply because the rule *could* be interpreted that way."[24] It was the *Lutheran Heritage* dissenters who insisted that mere ambiguity sufficed to invalidate a rule. "[W]e are struck," they wrote, "by the ambiguity of certain workplace rules—intended, perhaps, to achieve decorum and peace—that use words like 'abusive' and 'harassment.' . . . Surely a broad reading of their terms places certain workplace rules in serious tension with Section 7 rights protected by the Act."[25] The Board in *Boeing*, like the *Lutheran Heritage* majority, took the position that reasonable employees would understand what was "intended" and not give rules the "broad reading" the *Lutheran Heritage* dissent posited. It was right to do so, and that decision should not be revisited.

C. Boeing Creates Predictability

The Supreme Court has enjoined the Board to issue decisions that provide employers "certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice."[26] Measured against this imperative, the Board's rules-maintenance precedent prior to *Boeing* must be judged an abject failure. Scrutiny of rules through a Section 7 microscope resulted in bureaucratic hair-splitting, generating an indecipherable body of precedent where apparently similar rules were ascribed starkly different meanings, and undermining the Board's duty to promote industrial peace and stability through coherent precedent and clear guidance.[27] Prior to *Boeing*, for example, employers could prohibit "indulging in harmful gossip" but not "negative conversations about associates or managers."[28] They could ban "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with employees or patrons" but not "disrespectful conduct," even though disrespectful conduct may be offensive or have that effect.[29] Employers could require employees to use "appropriate business decorum in communicating with others," but

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with legitimate employer interests. That principle dates back to the Board's 1943 decision in *Peyton Packing*, where the Board upheld a rule prohibiting solicitation on working time, even though such a rule undoubtedly restricts the exercise of the Sec. 7 right to form, join, or assist a labor organization, on the basis that the rule protected the employer's legitimate interest in ensuring that "[w]orking time is for work." *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944); see also *Waco, Inc.*, supra, 273 NLRB at 748; *Our Way, Inc.*, 268 NLRB 394, 395 (1983) (endorsing *Stoddard-Quirk* as having "defin[ed] the balance among the rights of employees, employers, and unions with respect to the legal and practical problems presented by solicitation"); *International Business Machines Corp.*, 265 NLRB 638, 638 (1982); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 616 fn. 2, 617 (1962) (recognizing that resolving the legality of no-solicitation rules involves "striking a proper adjustment between conflicting rights" such that "the abridgement of either right [is] kept to a minimum"). Further, in its leading case on workplace rules prior to *Lutheran Heritage*, the Board expressly acknowledged that "[r]esolution of the issue presented by . . . contested rules of conduct involves" working out the adjustment between employee rights and employer interests of which the *Republic Aviation* Court spoke. *Lafayette Park Hotel*, supra, 326 NLRB at 825.

[20] 368 NLRB No. 93, slip op. at 1–2 (2019).

[21] Id., slip op. at 2 (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)).

[22] Id. (quoting *T-Mobile USA v. NLRB*, supra).

[23] Id.

[24] *Lutheran Heritage*, 343 NLRB at 647 (emphasis in original).

[25] Id. at 649 (Members Liebman and Walsh, dissenting in part).

[26] *First National Maintenance Corp. v. NLRB*, 452 U.S. at 678–679.

[27] See, e.g., *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996) ("The object of the National Labor Relations Act is industrial peace and stability."); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.").

[28] Compare *Hyundai America Shipping Agency, Inc.*, 357 NLRB at 861, with *KSL Claremont Resort, Inc.*, 344 NLRB 832, 832 (2005).

[29] Compare *Palms Hotel & Casino*, 344 NLRB 1363, 1367 (2005), with *Component Bar Products, Inc.*, 364 NLRB No. 140, slip op. at 1 fn. 1 (2016).

they could not require them "to work harmoniously with other employees."[30] And so on.[31]

Boeing sought to end this incoherence and to bring predictability into the Board's rules-maintenance caselaw, partly by replacing the previous hyper-technical scrutiny encouraged by the *Lutheran Heritage* dissent with a commonsense "reasonable employee" perspective, and partly by categorizing different kinds of rules and requiring that the Board "determine, in future cases, what types of additional rules fall into which category."[32] In *LA Specialty Produce*, we reiterated that the categories represent *types* of rules and that the purpose of the categories is "to provide the certainty and predictability that the Supreme Court in *First National Maintenance* required."[33] Further, in *AT&T Mobility*, we explained that "*Boeing* and *LA Specialty* provide a framework under which the endless uncertainty that pervaded rules-maintenance questions under *Lutheran Heritage* can come to an end—progressively over time, as more and more types of rules are designated into categories."[34] Unfortunately, the majority's decision to reconsider *Boeing* portends a return to the hair-splitting ways of the past.

In sum, *Boeing* implements the Supreme Court's instruction to "work out an adjustment" of employee rights and employer interests. It sets forth a standard under which workplace rules are analyzed from the viewpoint of those who are actually affected by them rather than that of labor-law professionals. In addition, it makes possible the development of a coherent body of rules-maintenance precedent, in keeping with another of the Court's instructions to the Board, namely, to give employers "certainty beforehand." There is no good reason to reconsider *Boeing.*

II. THE BOARD SHOULD NOT RECONSIDER CASES APPLYING *BOEING*

The Notice and Invitation for Briefs also asks whether the Board should adhere to *Apogee Retail LLC d/b/a Unique Thrift Store*, *Motor City Pawn Brokers*, *Nicholson Terminal & Dock Co.*, and *G&E Real Estate Management Services d/b/a Newmark Grubb Knight Frank.* In these cases, the Board upheld rules regarding investigative confidentiality, non-disparagement, and outside employment, respectively. It did so applying *Boeing*, and each of these decisions demonstrates not only the importance of the balancing of employee and employer rights required by *Boeing*, but also how failing to apply the *Boeing* framework produces ludicrous results: the invalidation of some of the most common and necessary workplace rules.

A. Confidentiality in Workplace Investigations: Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019)

In *Apogee Retail*, the Board held that rules requiring employees to maintain the confidentiality of workplace investigations for the duration of the investigation are categorically lawful to maintain.[35] Applying *Boeing*, the Board in *Apogee* implemented the Supreme Court's instruction to "work[] out an adjustment" between employees' Section 7 rights and employers' legitimate interests. It acknowledged that employees may be engaging in protected concerted activity when they discuss incidents of workplace misconduct.[36] But it also recognized that investigative confidentiality rules serve critically important interests, for employers *and* employees. Confidentiality ensures that potential witnesses will not coordinate their accounts of relevant events or confuse their own recollections with those of others. It also allows employers to "quiet[] fears that truthful disclosures may lead to retaliation"[37] by assuring employees that their candid statements will not be revealed—a vitally important assurance, since disclosures made in the course of an investigation may reveal grave wrongdoing, such as discrimination, harassment, bullying, or criminal misconduct. Such investigations also may implicate employees or supervisors with whom the interviewed employee has regular contact. It is essential that an employer be able to assure employees that their reports will be kept strictly confidential. Doing so also serves the employer's interest in obtaining evidence promptly, while employees' memory of relevant events is fresh.[38]

Recognizing, moreover, that the interests served by investigative confidentiality rules have their greatest saliency while the investigation is ongoing, the Board in *Apogee* distinguished between rules that limit confidentiality to the duration of the investigation and those that do not, placing the former in *Boeing* Category 1(b) and the latter in Category 2. And because Category 1(b) rules are lawful

[30] Compare *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1817 (2011), with *Costco Wholesale Corp.*, 358 NLRB 1100, 1112–1114 (2012).

[31] See *Boeing*, 365 NLRB No. 154, slip op. at 11–13 (providing further examples of incongruous results).

[32] Id., slip op. at 3–4. *Boeing* sorts rules into the following categories: rules that are lawful to maintain because they either do not interfere with the exercise of Sec. 7 rights (Category 1(a)) or their potential impact on such rights is outweighed by legitimate justifications (Category 1(b)); rules that warrant individualized scrutiny in each case (Category 2); and rules that are unlawful to maintain because they do interfere with the exercise of Sec. 7 rights, and the adverse impact on those rights is not outweighed by legitimate justifications (Category 3).

[33] 368 NLRB No. 93, slip op. at 2.

[34] 370 NLRB No. 121, slip op. at 7.

[35] 368 NLRB No. 144, slip op. at 1, 8. Open-ended investigative confidentiality rules, on the other hand, are evaluated on a case-by-case basis. Id., slip op. at 2, 9. Accordingly, the Board placed investigative confidentiality rules that apply only while an investigation remains open in *Boeing* Category 1(b), while rules that are not limited to the duration of the investigation belong in Category 2. Id., slip op. at 1, 8–9.

[36] It is also true that many such discussions are *not* protected by the Act. "'Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere griping.'" *Daly Park Nursing Home*, 287 NLRB 710, 710–711 (1987) (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). But because some such conversations may "look[] toward group action," a rule or policy that requires all investigations of misconduct to remain confidential restricts, to some extent, Sec. 7 activity.

[37] *Apogee Retail*, 368 NLRB No. 144, slip op. at 4.

[38] See id., slip op. at 4–5.

to maintain, *Apogee* gives employers "certainty beforehand" that an investigative confidentiality rule limited to open investigations will be deemed lawful, removing "fear of later evaluations labeling its conduct an unfair labor practice."[39]

The Board in *Apogee* overruled *Banner Estrella Medical Center*, a pre-*Boeing* decision that effectively prohibited employers from maintaining investigative confidentiality rules.[40] Like *Lutheran Heritage*—as misapplied in line with the *Lutheran Heritage* dissent, as described above—*Banner Estrella* made a pretense of accommodating employer interests, while in fact giving determinative weight to employee rights, contrary to the Supreme Court's mandate to balance rights and interests.[41] *Banner Estrella* did allow for the possibility that particular investigations might remain confidential, but it effectively prohibited employers from requiring confidentiality from the outset, by workplace rule or otherwise, since an employer could not know whether it would be able to make the showing *Banner Estrella* demanded until its investigation was underway.

Under *Banner Estrella*, investigative confidentiality was required to be dealt with on a case-by-case basis, and an employer violated Section 8(a)(1) by restricting employee discussions of any workplace investigation unless it presented "objectively reasonable grounds for believing that the integrity of the investigation w[ould] be compromised without confidentiality."[42] Specifically, under *Banner Estrella,* the employer was required to prove, "with respect to each specific investigation in which confidentiality was required, that 'witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, and there [was] a need to prevent a cover up,"[43] or other "comparably serious threats" to the integrity of the investigation.[44]

As we explained in *Apogee*, the *Banner Estrella* decision:

> disregarded the reality that a preliminary investigation is necessary in order to determine whether "witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up." Since the employer would not, at the outset, have the information it needs to make that determination, under *Banner Estrella* it is unable to provide the very assurances of confidentiality necessary to obtain the information it needs to make the determination *Banner Estrella* demands.[45]

Thus, under the pre-*Boeing* approach in *Banner Estrella*, employers could not maintain investigative-confidentiality rules at all. The *Banner Estrella* Board ignored the legitimate—indeed critical—employer *and employee* interests served by policies that require investigative confidentiality from the outset of an investigation, focusing instead on the potential infringement on Section 7 rights. Not only did this invalidate workplace policies maintained by countless employers, it was also contrary to EEO and OSHA workplace-investigation guidance.[46] *Banner Estrella* forced employers into a bind. They could choose to defy the law by requiring confidentiality from the outset, at the risk of incurring unfair labor practice liability. Or they could comply with the law but, in doing so, sacrifice the benefits of confidentiality, not just for employers, but for employees as well.

Apogee strikes an appropriate balance between employee rights and employer (and employee) interests. There is no good reason to reconsider it.

B. Non-Disparagement Rules: Motor City Pawn Brokers, 369 NLRB No. 132 (2020)

In *Motor City Pawn Brokers,* the Board, applying *Boeing*, found that the employer respondent did not violate the Act by maintaining a facially neutral rule prohibiting employees from disparaging their employer to customers or third parties.[47] In so finding, the Board recognized that while the rule potentially interfered with employees' Section 7 right to seek outside support regarding the terms and conditions of their employment, the potential interference was outweighed by the employer's legitimate interests: to ensure employee loyalty and protect the employer's relationships with customers.[48]

The Board's decision in *Motor City Pawn Brokers* is supported by both Supreme Court and Board precedent. In *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, the Supreme Court forcefully stated that "[t]here is no more elemental cause for discharge of an employee than disloyalty" and that the Act "did not weaken the underlying contractual bonds and loyalties of employer and employee."[49] The Board, too, has recognized employers' legitimate interest in protecting their reputation and preventing injury to their commercial image, interests served by prohibiting disparagement. Thus, for example, in *Pathmark Stores*, the Board held that an employer could prohibit its employees from displaying a message on their clothing that disparaged one of the employer's products and accused the employer of cheating.[50] The Board based its decision in *Pathmark* on the

[39] *First National Maintenance Corp. v. NLRB*, 452 U.S. at 678–679.

[40] 362 NLRB 1108 (2015), enf. denied on other grounds 851 F.3d 35 (D.C. Cir. 2017). We suppose that *Banner Estrella* also provided employers "certainty beforehand." Under *Banner Estrella*, employers could be certain that investigative confidentiality rules were unlawful, period. But for the reasons stated above, that was the wrong kind of certainty.

[41] See, e.g., *NLRB v. Great Dane Trailers*, 388 U.S. at 33–34 (describing the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy").

[42] 362 NLRB at 1110.

[43] *Apogee Retail*, 368 NLRB No. 144, slip op. at 4 (quoting *Banner Estrella*, 362 NLRB at 1109) (alterations in *Apogee*).

[44] *Banner Estrella*, 362 NLRB at 1111.

[45] *Apogee Retail*, 368 NLRB No. 144, slip op. at 5 (quoting *Banner Estrella*, 362 NLRB at 1109).

[46] Id.

[47] 369 NLRB No. 132, slip op. at 2, 5–7. *Motor City Pawn Brokers* addressed several rules. However, the majority's Notice invites briefing solely as to the non-disparagement rule.

[48] Id., slip op. at 6–7.

[49] 346 U.S. 464, 472 (1953).

[50] 342 NLRB 379–380 (2004).

employer's "legitimate interest in protecting its customer relationship."[51] Indeed, the success, and even the continued existence, of a business—and of the jobs that business provides—depend in large part on protecting that relationship and preserving the employer's reputation. While employees have a right to appeal to their employer's customers and to the broader public for support concerning their terms and conditions of employment, this right "[is] not unlimited in the sense that [it] can be exercised without regard to any duty which the existence of rights in others may place upon . . . employees."[52] The Board in *Motor City* ascribed appropriate weight to employers' vitally important interests, and there is no good reason to reconsider that decision.

C. No-Moonlighting Rules: Nicholson Terminal & Dock Co., 369 NLRB No. 147 (2020), and G&E Real Estate Management Services d/b/a Newmark Grubb Knight Frank, 369 NLRB No. 121 (2020)

The two other cases targeted in the Notice, *Nicholson Terminal* and *Newmark*, particularly highlight the drawbacks of the Board's pre-*Boeing* approach to work rules, policies, and handbooks. In both cases, a common rule among employers restricting outside employment—a so-called no-moonlighting rule—would have been ruled impermissible under the flawed pre-*Boeing* framework, which failed to consider the employer's legitimate interests, and under which rules were interpreted as labor lawyers would, not as would average employees.

Applying *Boeing*, the Board in *Nicholson Terminal* and *Newmark* found lawful rules prohibiting outside employment that could present a conflict of interest or have a detrimental impact on the employer's image.[53] In doing so, we reversed the administrative law judges in both cases because they misapplied *Boeing*. Viewing the rules from the perspective of labor-law insiders, the judges found the rules infringed on Section 7 rights, and they dismissed the substantial and legitimate interests served by the rules with the rationale drawn from the *Lutheran Heritage* dissent—i.e., those interests could be met with a more narrowly tailored rule.[54] To anyone other than these judges, and perhaps our colleagues—lawyers steeped in traditional labor law—it is utterly implausible that reasonable employees would interpret a no-moonlighting rule to prohibit them from exercising the right to engage in union activity, such as joining, volunteering, or working for a union.

In our decision reversing the judges and finding the rules lawful, we explained that the rules at issue were reasonably understood to be focused on preventing conflicts of interest that would arise from employees working for competitors or disreputable businesses and would *not* be reasonably understood to prohibit Section 7 activity. We also recognized that employers have a legitimate business interest in ensuring that their employees do not work for direct competitors or fall asleep at work due to long hours at second jobs and in adopting rules concerning outside employment accordingly. Indeed, such rules are "commonsense rules and requirements that most people would reasonably expect every employer to maintain."[55]

The fact that the majority has singled out these cases for reconsideration portends a return to the flyspecking days before *Boeing*, when the merest possibility that a rule might be understood to interfere with Section 7 activity was all it took to strike it down. We think it is a bad idea to consider returning to those days. *Nicholson Terminal* and *Newmark* were rightly decided and should not be reconsidered.

CONCLUSION

The Supreme Court recently reminded us that "Section 7 focuses on the right to organize unions and bargain collectively."[56] In keeping with this observation, the Board ought to devote the better part of its time and energy to ensuring free and fair elections and to dealing with employers who quell organizational efforts through intimidation or who refuse to bargain in good faith. Scrutinizing facially neutral workplace rules that target unprotected conduct to determine whether they might be construed by labor-law professionals to reach some protected conduct as well consumes resources better devoted to going after the real bad apples. Policing the margins of Section 7 in this way occupied an undue amount of the Board's resources, distracted the Agency from its core mission, and interfered with the Board's ability to issue cases in a timely manner. The majority's decision to issue this Notice and Invitation should prompt concern that those days may soon return.

Boeing, and the above cases applying it, implement the balanced approach mandated by the Supreme Court. They protect employees' Section 7 rights, while also recognizing that employee rights and legitimate employer interests may collide, and that sometimes those interests are sufficiently weighty that some limitation on the exercise of employee rights ought to be tolerated. They inject common sense into the Board's interpretation of workplace rules, viewing them from the perspective of the employees who are subject to them, not of attorneys at the National Labor Relations Board. And *Boeing*'s system of categories for various *types* of rules, replacing the Board's former case-by-case, rule-by-rule approach, creates predictability and provides "certainty beforehand" that a properly drafted rule will not be invalidated by Board second-guessing.

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[51] 342 NLRB at 379; see also *Noah's New York Bagels, Inc.*, 324 NLRB 266, 275 (1997) (upholding ban on T-shirts emblazoned with a slogan "mocking [the employer's] Kosher policy").

[52] *Republic Aviation*, 324 U.S. at 798.

[53] The Board placed such rules in *Boeing* Category 1(a).

[54] See *Newmark Grubb Knight Frank*, 369 NLRB No. 121, slip op. at 7 (stating that the employer "can . . . safeguard[] its valid interest in avoiding conflicts, by, for example, excluding union and other NLRA activities from the rule's scope"); *Nicholson Terminal*, 369 NLRB No. 147, slip op. at 12 (stating that the employer's "legitimate interest . . . could be addressed with a better tailored rule").

[55] *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 1.

[56] *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

Such benefits should not be abandoned, and these cases should not be reconsidered.

Accordingly, we respectfully dissent.

Dated, Washington, D.C. January 6, 2022

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John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

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Marvin E. Kaplan, Member