UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY

and

JOANNA GAMBLE,
an Individual.

Case NO. 19-CA-089374

BRIEF IN SUPPORT OF EXCEPTIONS FILED BY THE BOEING COMPANY

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I. INTRODUCTION

The Boeing Company ("Boeing") submits this brief in support of its Exceptions to Decision of Administrative Law Judge ("Exceptions"), filed herewith. The Exceptions set forth Boeing's exceptions to findings, conclusions, and recommendations in the Decision of Administrative Law Judge Jeffrey D. Wedekind in this case, dated July 26, 2013 (the "Decision").

This case presents a facial challenge to a Notice of Confidentiality and Prohibition Against Retaliation ("Notice") form. Boeing has used two versions of the Notice with witnesses in Human Resources ("HR") investigations. The Complaint in this case alleges that both versions interfered with employees' exercise of Section 7 rights in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the "Act"). Boeing denies this claim.

A related, but subsidiary, issue in this case involves the application of the Notice to a single employee, Joanna Gamble. Ms. Gamble received a written warning when she volunteered to Boeing that she had deliberately violated terms of the earlier version of the Notice. The Complaint alleges that this warning interfered with Ms. Gamble's Section 7 rights. Boeing disagrees, but any alleged violation was, in any event, cured when Boeing promptly rescinded and forcefully repudiated the written warning.

This case also poses intractable issues related to the National Labor Relations Board's ("Board") lack of a statutorily mandated quorum prior to July 30, 2013. These issues are, however, primarily for judicial determination.

II. FACTUAL AND PROCEDURAL HISTORY

A. Procedural History

This case is submitted on a stipulated factual record. *See* Joint Motion and Stipulation of Facts (June 5, 2013) ("Joint Motion").[1]

On September 17, 2012, Ms. Gamble filed the Charge in this case, which alleged she had been disciplined on August 9, 2012, for discussing terms and conditions of her employment with coworkers. SOF ¶ 1; Ex. A. On November 16, 2012, an Amended Charge added a facial challenge to the Notice. SOF ¶ 2; Ex. B.

On January 29, 2013, the Regional Director issued Complaint based on the claims in the Amended Charge. SOF ¶ 3; Ex. C.

On July 26, 2013, Administrative Law Judge Wedekind (the "ALJ") issued the Decision and the Executive Director issued an order transferring these proceedings to the Board.

B. The Notice Forms

This case concerns forms used by Boeing's HR Generalists when investigating employee conduct issues. SOF ¶¶ 9-10. The Complaint presents facial challenges to two distinct Notice forms.

From September 2011 through October 2012, at most of Boeing's United States locations, witnesses in HR investigations were given the original version of the Notice. SOF ¶ 11. This form (the "old Notice") is captioned, "Human Resources Generalist (HRG) Notice of Confidentiality and Prohibition against Retaliation," and includes the following guidance:

> Human Resources investigations deal with sensitive information and may be conducted under authorization of the Boeing Law Department. Because of the sensitive nature of such information, you are directed not to discuss this case with any Boeing employee other than company employees who are investigating this issue or your union representative, if applicable. Doing so could impede the investigation and/or divulge confidential information to other employees.

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[1] Stipulated facts set forth in Part II ("Stipulation of Facts") of the Joint Motion are cited as "SOF ¶ [number]." Stipulated exhibits appended to the Joint Motion are cited as "Ex. [number]."

. . . .

> If any coworker or manager asks to discuss the case with you, please inform him or her that you have been instructed not to discuss it and refer the individual to the Human Resources representative who is investigating your concern.
>
> The company prohibits retaliation against any individual who makes a complaint or participates in an investigation.

Ex. E.

Effective November 2012, Boeing rescinded the old Notice and replaced it with a revised version (the "Revised Notice"), which witnesses in HR investigations at most of Boeing's United States locations have been given since that date. SOF ¶ 12. The Revised Notice has the same caption and format as the old Notice, but it includes several material changes. For example, where the old Notice told witnesses, "*you are directed not to discuss* this case with any Boeing employee other than . . . ," Ex. E (emphasis added), the Revised Notice states, "*we recommend that you refrain from discussing* this case with any Boeing employee other than . . . ." Ex. F (emphasis added). Similarly, where the old Notice said, "[i]f any coworker or manager asks to discuss the case with you, please inform him or her that *you have been instructed not to discuss it* and refer the individual to the" HR investigator, Ex. E (emphasis added), the Revised Notice states, "[i]f any coworker or manager asks to discuss the case with you, *we recommend* that you inform him or her that Human Resources *has requested* that you not discuss the case . . . ." Ex. F (emphasis added).

The record contains no evidence that either Notice form in fact interfered with, restrained, or coerced any Boeing employee in the exercise of rights guaranteed by Section 7 of the Act. Nor, with the single exception discussed below, does the record contain any evidence that any employee was ever disciplined for violating terms of either Notice.

C. Ms. Gamble's Claim

Ms. Gamble works for Boeing as a Product Data Management Specialist, a non-represented job. SOF ¶ 15. The stipulated record contains considerable detail about Ms. Gamble, but the essential facts for her claim can be briefly stated.

On June 5, 2012, in connection with an HR investigation, Ms. Gamble acknowledged receipt of a copy of the old Notice. SOF ¶ 22; Ex. I. On June 11, 2012, the HR Generalist responsible for that investigation sent Ms. Gamble an email stating, "[w]e have received information that the Notice may have been breached by at least one of the individuals involved in the HR Investigation." SOF ¶ 27; Ex. N.1, at 2. Ms. Gamble replied by volunteering, "I did breach the confidentiality agreement." SOF ¶ 27; Ex. N.1, at 1. On July 26, 2012, in a subsequent investigation based on this disclosure, Ms. Gamble stated, "I knew that I was breaching the confidentiality notice." SOF ¶ 29, Ex. O.

On August 9, 2012, Ms. Gamble was issued a written warning for failing to comply with the old Notice when she "discussed the investigation with others." SOF ¶ 31, Ex. Q. This warning came to the attention of Boeing's Law Department on September 24, 2012, and Boeing immediately rescinded the warning, effective September 28, 2012. SOF ¶¶ 32-34; Ex. R. On October 1, 2012, Boeing formally notified Ms. Gamble that the warning had been rescinded and repudiated. SOF ¶ 34; Ex. R. The warning was only in effect for approximately six weeks.

The record contains no evidence that any employee other than Ms. Gamble herself was ever aware of the warning. As noted, the record also contains no evidence that any other Boeing employee has ever been disciplined for violating terms contained in either version of the Notice.

III. ISSUES

Fundamental authority questions aside, this case presents three merits issues:

1. From March 17, 2012, to October 2012, did Boeing interfere with, restrain, and/or coerce employees in the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act by issuing the old Notice to witnesses in HR Investigations?

2. Since November 2012, has Boeing interfered with, restrained, and/or coerced employees in the exercise of Section 7 rights in

violation of Section 8(a)(1) of the Act by issuing the Revised Notice to witnesses in HR Investigations?

3. Between August 9, 2012, and September 28, 2012, did Boeing interfere with, restrain, and/or coerce Ms. Gamble in the exercise of her Section 7 rights in violation of Section 8(a)(1) of the Act by issuing the written warning?

The answer to each question is "no." The ALJ erroneously answered all three questions "yes."[2]

IV. THE ALJ DECISION

With respect to the old Notice, the ALJ conceded that Boeing's arguments in this case "are not without factual or legal support," Decision at 3:18, but nonetheless concluded he was bound to follow the Board's decisions in *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012) ("*Banner*"), and *Hyundai America Shopping Agency, Inc.*, 357 NLRB No. 80 (2011) ("*Hyundai*"), unless and until reversed by the Supreme Court. Decision at 3:32-33. On that basis, the ALJ made the following determinations:

- "[T]he Company's routine use of the original confidentiality notice to prohibit employee witnesses from discussing ongoing HR investigations with other employees violated Section 8(a)(1) of the Act, as alleged." Decision at 3:34-36.
- "By maintaining and routinely distributing [the old Notice] to employees involved in HR investigations," Boeing engaged in unfair labor practices in violation of Section 8(a)(1) of the Act. Decision at 9:23.

Turning to the Revised Notice, the ALJ completely discounted the effect of extensive language changes. Based on a strained reading of isolated terms of the Revised Notice taken out of context, the ALJ ruled:

- "[T]he revised notice would have a reasonable tendency to chill employees from exercising their statutory rights." Decision at 5:10-11.

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[2] This case also presents the threshold question of whether the lack of a valid Board quorum rendered the Complaint and Decision unauthorized and void and the prosecution of this case by the Acting General Counsel unauthorized and unlawful. Boeing submits that the answer to this question is "yes," and the ALJ erroneously answered it "no." Decision at 2 n.3; Exception 1. This issue is primarily a matter for judicial determination, but it is addressed briefly in Section V(F).

- "I find the Company's routine use of the revised confidentiality notice in ongoing HR investigations since November 2012 . . . violated Section 8(a)(1) of the Act, as alleged." Decision at 5:21-23.
- The "revised confidentiality notice . . . is just as unlawful as the original under prevailing Board law." Decision at 9:17-18.
- "By maintaining and routinely distributing [the Revised Notice] to employees involved in HR investigations," Boeing engaged in unfair labor practices in violation of Section 8(a)(1) of the Act. Decision at 9:23-27.

Finally, the ALJ determined that the written warning issued to Ms. Gamble for disregarding the old Notice was unlawful, Boeing did not adequately repudiate that warning, and accordingly Boeing committed an unfair labor practice in violation of Section 8(a)(1) of the Act by issuing the warning. Decision at 8:9-9:19, 9:29-32.

Based on these findings and conclusions, the ALJ determined that "a general posting remedy is appropriate." Decision at 9:42. The ALJ issued a recommended Order, which includes sweeping "cease and desist" terms, would require rescission of the Revised Notice, and provides for posting one form of remedial notice at Boeing's facility in Renton, Washington, and a different form of remedial notice at other Boeing facilities. Decision at 10:5-11:17.

V. BOEING'S EXCEPTIONS

Boeing has filed 23 exceptions to the Decision. These exceptions are addressed topically below.

A. The Old Notice

1. Applicable Law

Boeing has filed exceptions to the ALJ's core findings and conclusions concerning the old Notice. These include (a) the finding that Boeing's "routine use" of the old Notice "to prohibit employee witnesses from discussing ongoing HR investigations with other employees" violated Section 8(a)(1) (Decision at 3:34-36; Exception 2); and (b) the conclusion of law that,

"[b]y maintaining and routinely distributing [the old Notice] to employees involved in HR investigations," Boeing "engaged in unfair labor practices in violation of Section 8(a)(1)" (Decision at 9:23; Exception 3).[3] These findings and conclusions—and Boeing's exceptions to them—turn on the validity of the "rule" the Board foreshadowed in *Hyundai* and confirmed in *Banner*. The ALJ acknowledged serious reservations about this rule, but concluded he had no choice but to follow it until overruled by the Supreme Court. Decision at 3:18-32.

As further discussed in Part F below, after *Banner* and *Hyundai* were decided, the United States Court of Appeals for the District of Columbia Circuit determined that President Obama's recess appointments of certain Board members were ineffective. *Noel Canning v. NLRB*, 705 F.3d 490, 499-514 (D.C. Cir.), *cert. granted,* 133 S. Ct. 2861 (June 24, 2013). Both *Banner* and *Hyundai* are currently on appeal to the United States Court of Appeals for the District of Columbia Circuit, where the cases are held in abeyance in light of the *Noel Canning* decision. *See Hyundai American Shipping Agency, Inc. v. NLRB*, No. 11-1351 (D.C. Cir. Feb. 19, 2013); *Banner Health System v. NLRB*, No. 12-1359 (D.C. Cir. Jan. 25, 2013). Boeing maintains that neither case is good law, and it anticipates that neither will survive appeal. In addition to being wrongly decided, neither case has any force or effect due to ineffective appointments. *See Noel Canning*, 705 F.3d at 499-514; *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 208, 244 (3d Cir. 2013) (vacating orders of three-member panel that included Member Becker because his appointment during intrasession break was invalid); *National Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 952 (D.C. Cir. 2013) (Member Becker's March 2010 appointment "was constitutionally invalid").[4] Accordingly, the ALJ's findings and conclusions concerning the old Notice should be decided based on settled law without reference to either *Banner* or *Hyundai*. Based on these standards, it is clear that Boeing's historic use of the old Notice in ongoing HR investigations did not violate the Act.

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[3] *See also* Exception 20 to the finding that "the Company violated that Act as alleged." Decision at 2:5.
[4] Member Becker was part of the three-member panel that decided *Hyundai*. 357 NLRB No. 80.

2. Boeing Has a Substantial and Legitimate Need to Maintain the Confidentiality of HR Investigations

Employers have legitimate business justifications for asking employees to keep internal investigations confidential. These justifications include: protecting witnesses, victims, or accused workers (from invasion of privacy, slander, harassment, and retaliation); preventing unfounded rumors from spreading; ensuring the employer will get the full truth through investigation; and encouraging employees with complaints and information to come forward with such information. *See generally IBM Corp.*, 341 NLRB 1288, 1293 (2001). In *IBM Corp.*, the Board recognized that employers "need[] to conduct all kinds of investigations of matters occurring in the workplace to ensure compliance with [] legal requirements."[5] *Id.* The Board further held that

> [e]mployer investigations into these matters *require discretion and confidentiality*. The guarantee of confidentiality helps an employer resolve challenging issues of credibility involving these sensitive, often personal, subjects. The effectiveness of a fact-finding interview in sensitive situations often depends on whether an employee is alone. If information obtained during an interview is later divulged, even inadvertently, the employee involved could suffer serious embarrassment and damage to his reputation and/or personal relationships and the employer's investigation could be compromised by inability to get the truth about workplace incidents.

Id. (emphasis added; footnote omitted). Not only did the Board recognize the importance of maintaining confidentiality in workplace investigations, the Board held that confidentiality was *required* in order to ensure reliable investigations. *Id.*; *see also Desert Palace, Inc. d/b/a Caesar's Palace*, 336 NLRB 271, 272 (2001) (rule requiring confidentiality during investigation was justified by employer's interest in ensuring witness safety and truthful interviews, among other considerations); *Belle of Sioux City, LP*, 333 NLRB 98, 113-14 (2001) (adopting ALJ

[5] Among the types of investigations identified by *IBM* are those intended to address sexual and racial harassment, substance abuse, toxic chemicals, employee health, unauthorized or improper computer or Internet usage, and misconduct including theft, violence, sabotage, and embezzlement.

decision rejecting challenge to instruction not to discuss investigation based on employer's legitimate interest in ensuring "proper and uncompromised investigation").

Employers must comply with a host of federal and state laws, many of which require employers to maintain the confidentiality of certain information. *See, e.g.*, 42 U.S.C. § 2000e *et seq.* (Title VII of the Civil Rights Act of 1964 ("Title VII")); 42 U.S.C. § 12101 (Americans with Disabilities Act); 29 U.S.C. § 2601 (Family and Medical Leave Act); 29 U.S.C. § 627 (Age Discrimination in Employment Act); 29 U.S.C. § 651 (Occupational Safety & Health Act); 38 U.S.C. § 4334 (Uniformed Service Employment & Reemployment Rights Act). In enforcing Title VII, the U.S. Equal Employment Opportunity Commission ("EEOC") has determined that confidentiality is *essential* to conducting investigations. The EEOC Enforcement Guidance states that employers must "protect the confidentiality of harassment complaints to the extent possible" and should "make [this commitment to confidentiality] clear to employees."[6] Instructing employees to keep workplace investigations confidential may be essential to protecting employees' rights under federal law. *See Roby v. CWI, Inc.*, 579 F.3d 779, 786 (7th Cir. 2009) (employer exercised reasonable care in handling a harassment complaint because it "performed an investigation, instructed interviewees that the information was confidential, [and] fired a supervisor when he breached confidentiality"). The Act should not be interpreted to override employees' rights to confidentiality under other employment laws. *See Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 144 (2002); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 251 (1970); ; *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

The Board recognizes the importance of confidentiality in its own investigations and has defended its blanket practice of keeping witness affidavits confidential. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (arguing that witness statements are exempt from Freedom of Information Act requests); *see also Ampersand Publishing, LLC*, 358 NLRB 155 (2012) (employer's subpoena of employees who demanded confidential witness affidavits made

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[6] EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Notice 915.002, V.C.1.a, n. 58 (June 18, 1999), available at http://www.eeoc.gov/policy/docs/harassment.html.

pursuant to Board investigation was unfair labor practice). In *Robbins Tire*, the Board argued against "a particularized, case-by-case showing" because such individual determination "is neither required nor practical." 437 U.S. at 222.

B. Boeing Did Not Violate Section 8(a)(1) by Using the Old Notice Form in HR Investigations

The Complaint characterizes the old Notice as a "nationwide policy directing [Boeing] employees to refrain from discussing ongoing Human Resources investigations with other employees." Ex. C, ¶ 4(a).[7] Boeing disputes this characterization, as the Notice was not published, communicated, available, or applied to employees generally. Rather, it was only given to the relatively small population of employees who were actual complainants or witnesses in HR investigations. SOF ¶ 11. As to these individuals, however, the old Notice does include terms that effectively established a rule of conduct for ongoing HR investigations.

Employees may, in some cases, have a protected right to discuss an ongoing investigation, and a rule prohibiting discussion of the investigation may affect employees' exercise of that right. *Caesar's Palace*, 336 NLRB at 272.

> It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweighs [sic] Respondent's asserted legitimate interest and substantial business justifications.

Id.

In this case the old Notice protected Boeing's legitimate business interests in ongoing investigations. As outlined above, ensuring the integrity of investigations, preventing workplace retaliation for participation in investigations, and fostering an environment where employees readily report issues are all legitimate and substantial justifications for Boeing's old Notice. *See*

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[7] As the ALJ acknowledged, this case does not present questions about application of either the old Notice or the Revised Notice to *closed* investigations, as distinguished from *ongoing* investigations. Decision at 3-4 n.5. The Amended Charge and the Complaint only challenged the Notices with respect to "*ongoing* Human Resources investigations." Ex. B (emphasis added); Ex. C ¶¶ 4(a), (b) (emphasis added).

Ex. E. Although the specific interests at stake might vary from case to case, Boeing has legitimate interests in keeping every ongoing HR investigation confidential.

The old Notice was carefully tailored to address these legitimate concerns. In the narrow area of potential conflict, Boeing's legitimate interests in confidentiality outweighed any potential employee interest in discussing ongoing HR investigations. Accordingly, Boeing's maintenance of the old Notice did not violate Section 8(a)(1).

By its terms, the old Notice only limited discussing the investigation itself ("this case"). Ex. E. Nothing in the old Notice purported to restrict employees from discussing any underlying facts, concerns, policies, or rules that might be implicated in the investigation, or from encouraging other employees from making or pursuing complaints. The restriction was instead limited to the investigation itself, in which Boeing had an overriding interest in confidentiality.

The old Notice must be given a "reasonable reading, and particular phrases cannot be read in isolation or presumed to have improper interference with Section 7 rights." *Guardsmark, LLC*, 344 NLRB 809 (2005); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf'd*, 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). No reasonable employee would read the old Notice, taken as a whole, as prohibiting communications beyond those directly implicating the employer's core interests in protecting employees, encouraging employees to report concerns, and ensuring the integrity of its investigations. This view is reinforced by the fact that the old Notice itself explains the reason for the rule, and it expressly excludes protected communications with union representatives.

Finally, the record includes no evidence that the old Notice in fact ever chilled *any* employee in the exercise of Section 7 rights. The old Notice was routinely used in HR investigations prior to November 2012, but the record only contains details about a single specific example—the Notice Ms. Gamble electronically signed on June 5, 2012. SOF ¶¶ 11, 22; Ex. I. It is undisputed that this Notice did not chill Ms. Gamble's exercise of Section 7 rights. To the contrary, regardless of whether her disclosures about the investigation qualified as

concerted protected activity, there is no evidence she had any reservations about engaging in those communications.[8]

C. The Revised Notice

Even if the old Notice was problematic, its arguable deficiencies were cured in November 2012, when Boeing jettisoned the old Notice form and replaced it with the Revised Notice. The Revised Notice is, without question, fully compliant with governing law.

The ALJ's findings and conclusions concerning the Revised Notice are premised on the view that *Banner* and *Hyundai* are valid and controlling and that, based on those cases, Boeing's use of the old Notice in ongoing HR investigations violated the Act. If, as Boeing maintains, this premise is wrong, the Board must also sustain each of Boeing's exceptions to the Revised Notice findings and conclusions. These include exceptions to (1) the finding that Boeing's "routine use" of the Revised Notice "in ongoing HR investigations since November 2012" violated Section 8(a)(1) (Decision at 5:21-23; Exception 12); (2) the finding that Boeing "has continued to routinely require employee witnesses in HR investigations to sign a revised confidentiality notice that is just as unlawful as the original under prevailing Board law" (Decision at 9:16-18; Exception 13); and (3) the conclusion of law that, "[b]y maintaining and routinely distributing [the Revised Notice] to employees involved in HR investigations," Boeing "engaged in unfair labor practices in violation of Section 8(a)(1)" (Decision at 9:23; Exception 14).[9]

If *Banner* and *Hyundai* are ultimately determined to be valid and binding, the Revised Notice would still be lawful. The November 2012 changes cured any arguable defects in the old Notice and, when read in its entirety, the Revised Notice cannot reasonably be construed as a rule prohibiting protected concerted activity.[10]

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[8] Ms. Gamble repeatedly and openly engaged in such communications after receiving and signing the old Notice. *See* SOF ¶¶ 25, 27, 29; Exs. K, L, N, O. Specifically, she emailed Camille Foote, Amber Stroscheim, Sandra Ingraham, and Jean Rainbow regarding the results of the first HR investigation. Exs. N1, N2, O.

[9] *See also* Exception 20 challenging the finding that "the Company violated that Act as alleged." Decision at 2:5.

[10] The following discussion supports Boeing's Exceptions 5 through 14.

Unlike the old Notice, the Revised Notice cannot even potentially be construed as a work rule or directive prohibiting employee discussions of workplace investigations. *See Praxair Distribution, Inc.*, 358 NLRB No. 7, slip op. at 6 (2012) (employer's decision "did not amount to a 'rule' of any kind"); *Caesar's Palace*, 336 NLRB at 272 (confidentiality "rule" justified in light of employer's legitimate business need). The Revised Notice does not impose *any* confidentiality requirements. To the contrary, it merely *recommends* that employees refrain from discussing the HR investigation with coworkers and management. *Id.* Such a recommendation is, of course, not a rule that "command[s] or require[s] or exert[s] control" over employees. BLACK'S LAW DICTIONARY 1446 (9th ed. 2009). Under the Revised Notice, the choice of whether to discuss investigations lies with each individual employee.[11]

Even if the Revised Notice is deemed a "rule," it cannot reasonably be read to prohibit protected concerted activity. In determining whether employees would reasonably construe language to prohibit Section 7 activities, a rule should be given a "reasonable reading," and the Board must "refrain from reading particular phrases in isolation or presuming improper interference with employee rights." *Guardsmark, LLC*, 344 NLRB at 809; *accord Lafayette Park Hotel*, 326 NLRB at 825, 827. The Board

> [w]ill not conclude that a reasonable employee would read the rule to apply to [Section 7] activity simply because the rule *could* be interpreted in 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 if that reading is unreasonable. We decline to take that approach.

Lutheran Heritage Village-Livonia, 343 NLRB at 647.

The Complaint in this case is premised on isolating one particular phrase from the Revised Notice and reading it out of context. Specifically, the Complaint focuses exclusively on the phrase, "we recommend that you refrain from discussing this case with" other Boeing employees. Exs. C ¶ 4(b), F. Boeing maintains that, even when considered in isolation, no

[11] Indeed, even *Banner* supports the view that an employer's "mere suggestion," as opposed to a "rule," regarding confidentiality does not violate Section 8(a)(1). *See Banner*, 358 NLRB No. 93, slip op. at 2.

reasonable employee would interpret these words as prohibiting them from engaging in Section 7 activities. Any such suggestion is, moreover, entirely foreclosed when the passage is placed in context with the Revised Notice as a whole.[12]

The Revised Notice states:

> **HUMAN RESOURCES GENERALIST (HRG)**
> **Notice of Confidentiality and Prohibition Against Retaliation**
>
> Human Resources investigations deal with sensitive information. Because of the sensitive nature of such information, we recommend that you refrain from discussing this case with any Boeing employee other than company representative[s] investigating this issue or your union representative, if applicable. Doing so could impede the investigation and/or divulge confidential information to other employees.
>
> As a participant in the investigation, the information you provide will be treated in a sensitive manner, however the investigator will not promise absolute confidentiality. Information regarding the investigation may be disclosed to persons(s) on a need to know basis.
>
> Please contact the investigator if you have any questions in this matter. If any coworker or manager asks to discuss the case with you, we recommend that you inform him or her that Human Resources has requested that you not discuss the case, and refer the individual to the Human Resources representative who is investigating the matter.
>
> The company prohibits retaliation against any individual who makes a complaint or participates in an investigation. If you believe that you or another individual has been subjected to retaliation because you filed a complaint or participated in an investigation, immediately contact the HR representative at _____.

Ex. F.

When the Revised Notice is read as a whole, several things stand out:

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[12] Boeing filed an exception (Exception 5) to the ALJ's finding that Boeing "argues that, by substituting 'recommend' for 'directed,' the revised confidentiality notice has cured any arguable deficiencies in the original notice." Decision at 4:30-31. Boeing has consistently argued that the Revised Notice must be read as a whole, taking into account *all* of its terms and *all* of the changes from the old Notice. *See* Respondent's Brief on Stipulated Record, at 12-16.

- First, the *reason* for the recommendation that employees refrain from discussing the case is clearly stated: because HR investigations deal with sensitive information, and discussing investigations could "impede the investigation" or "divulge confidential information." *Id.* These are, of course, entirely appropriate concerns. Moreover, any reasonable employee reading the Revised Notice would interpret the recommendation not to discuss the case to only apply where these concerns are in fact implicated.
- The first sentence of the second paragraph states Boeing's commitment to treat information that witnesses provide "in a sensitive manner," but also states clearly that the investigator cannot *promise* confidentiality. *Id.* This distinction places the "recommendation" in the first paragraph in context by emphasizing that: (a) confidentiality is never absolute, (b) whether it is appropriate to discuss investigation information will depend on the circumstances, and (c) all investigation participants must exercise judgment in deciding what to disclose to whom.
- The second sentence of the second paragraph is even more compelling. It states, "[i]nformation regarding the investigation may be disclosed to persons(s) on a need to know basis." *Id.* This statement conspicuously is *not* limited to disclosures by the investigator. By its terms, the sentence authorizes *witnesses* to disclose information about the investigation on a need-to-know basis. Further, the Revised Notice explicitly allows employees to discuss the investigation with their union representative, if applicable. This reinforces the message that employees are permitted to disclose information about the investigation to persons the employee believes have a legitimate need to know, including other employees with whom they may have common cause.
- The third paragraph further reinforces the permissive terms of the first paragraph. It "recommend[s]" that, if asked about the case by a coworker or manager, the

witness can say HR "requested" that they not discuss it. This is helpful advice for an employee who prefers not to discuss a sensitive personnel matter with others (it suggests a simple, non-confrontational, stock response), but it also drives home that the employee is free to answer questions about and discuss the case if he or she chooses to do so.

- Finally, the caption and the fourth paragraph clearly distinguish between the permissive and mandatory aspects of the Revised Notice form. The form covers two distinct subjects: it contains a "Notice" of confidentiality and a "Prohibition" against retaliation. *Id.* The confidentiality terms are all informational, circumstance-specific, and discretionary. In contrast, the retaliation prohibition is mandatory and absolute.[13]

In sum, when the Revised Notice is read as a whole and the terms challenged in the Complaint are placed in context, no reasonable employee would interpret it as prohibiting discussion of ongoing investigations. Boeing's use of the Revised Notice in HR investigations does not interfere with Section 7 rights and does not violate Section 8(a)(1) of the Act.

The ALJ found—incorrectly—that the Revised Notice should nonetheless be deemed a coercive request analogous to the handbook statement found to be unlawful in *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), *enf'd*, 987 F.2d 1376 (8th Cir. 1993). Decision at 4:40-43.[14] *Radisson Plaza* is easily distinguished. In that case, the Board carefully considered the terms and effect of the handbook passage *as a whole* to determine whether it had a reasonable tendency to coerce employees in the exercise of their Section 7 rights. *Radisson Plaza Minneapolis*, 307 NLRB at 94. The passage included an illustration of a paycheck emblazoned with the words "TOP SECRET" and stated, "your salary is determined individually, is confidential, and

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[13] Boeing has filed an exception (Exception 4) to the ALJ's finding that the anti-retaliation terms of the Revised Notice, including the name and the entire fourth paragraph of the Revised Notice, are not "relevant" to this dispute. Decision at 4:1-23. It is inconceivable that these terms would not affect how a reasonable employee would interpret the Revised Notice.

[14] This finding is the subject of Boeing's Exception 7. The related finding that "the General Counsel has the better argument under extant law" with respect to the Revised Notice, Decision at 4:39, is the subject of Exception 6.

shouldn't be discussed with anyone other than your supervisor or the Personnel Department." *Id.* As the Board observed, "whatever distinction there may be between a rule that *requires* employees to keep their wages confidential and one that *advises* them that they *should not* discuss wages . . . is obliterated by the Respondent's use of a graphic that boldly indicates that the contents of an employee's pay envelope are 'top secret.'" *Id.* n.2. (There is of course no comparable language in the Revised Notice.) *Radisson Plaza* reinforces Boeing's point that particular words or phrases must not be read out of context and, instead, the Revised Notice must be read as a whole. Whether a particular word, sentence, or phrase might be construed in isolation as a "rule," a "recommendation," a "request," or a "mere suggestion" is not material where, as here, an employee reading the Revised Notice as a whole would not reasonably construe it to prohibit Section 7 activity.

Based on the foregoing, Boeing submits that the ALJ's penultimate finding that "the revised notice would have a reasonable tendency to chill employees from exercising their statutory rights" is not supported by the evidence and is, indeed, utterly inconsistent with the terms of the Revised Notice. Decision at 5:10-11.[15] Based on the same analysis, the ALJ's subsidiary findings addressed in Exceptions 8 through 10,[16] and the ultimate findings and conclusions addressed in Exceptions 12, 13, 14, and 20, are not supported by the evidence and cannot be reconciled with the terms of the Revised Notice when read as a whole.

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[15] This finding is the subject of Boeing's Exception 11.

[16] *See* Exception 8 (finding that "nothing in the revised notice can reasonably be interpreted as an assurance to employees that they are nevertheless 'free' to disregard the Company's recommendation/request and 'discuss the case if he or she chooses to do so'"; Decision at 5:4-7); Exception 9 (finding that "the second sentence of the second paragraph" of the Revised Notice does not support the conclusion that, when the Revised Notice is read as a whole and the terms challenged in the Complaint are placed in context, no reasonable employee would interpret it as prohibiting discussion of ongoing investigations, and finding specifically that the sentence cannot be read to authorize witnesses to disclose information "on a need to know basis"; Decision at 5 n.6.); Exception 10 (finding that "the fourth and last paragraph" of the Revised Notice does not support the conclusion that, when the Revised Notice is read as a whole and the terms challenged in the Complaint are placed in context, no reasonable employee would interpret it as prohibiting discussion of ongoing investigations; Decision at 5 n.6.).

D. Ms. Gamble's Individual Claim

1. Boeing Did Not Violate Section 8(a)(1) by Issuing the Warning to Ms. Gamble

The ALJ erred in concluding that Boeing violated Section 8(a)(1) by issuing the written warning to Ms. Gamble. Decision at 9:29-32; *see also* Decision at 2:5.[17]

The record contains extensive evidence of emails Ms. Gamble sent coworkers, which the Acting General Counsel submitted as evidence of concerted protected activity. However, it is undisputed that Boeing's investigators and decision-makers never saw any of these communications, and Ms. Gamble never disclosed the specifics of what she told these individuals. Ms. Gamble was not disciplined for these undisclosed communications. Instead, she was disciplined for the conduct she *told* the Boeing investigators she engaged in, which did not qualify as concerted protected activity.[18]

On May 16, 2012, Ms. Gamble sent an email to several Boeing executives complaining about her supervisor and a coworker. SOF ¶ 18. In June, Kelsie Sanchez Islas was assigned to investigate three specific allegations from this email, and Ms. Gamble signed the old Notice as a part of this investigation. SOF ¶¶ 20, 22. Ms. Sanchez later received an email from Ms. Stroscheim that appeared to reflect inside knowledge of the investigation. In response to an email from Ms. Sanchez, Ms. Gamble then volunteered that she had breached the old Notice. SOF ¶ 27; Ex. N.1. A second investigator then interviewed Ms. Gamble, and this interview was then reduced to a written statement by Ms. Gamble. SOF ¶ 28; Ex. O.

In issuing the written warning, Boeing relied exclusively on the emails from Ms. Stroscheim and Ms. Gamble to Ms. Sanchez, and Ms. Gamble's written statement. *See* Ex. P. Review of these documents confirms that Ms. Gamble was not disciplined for concerted protected activity. First, Ms. Stroscheim noted only that Ms. Gamble "advised several of us that

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[17] These conclusions are the subjects of Exceptions 19 and 20.

[18] The ALJ did not expressly find that Ms. Gamble was disciplined for engaging in concerted protected activity. In the event such a finding is deemed implicit in the ALJ's other findings and conclusions of law related to Ms. Gamble's individual claim, it is covered by Boeing's objections to those specific findings and conclusions. *See, e.g.*, Exceptions 16, 17, 19, 20.

our names were mentioned with respect to a case." Ex. M. In Ms. Gamble's email to Ms. Sanchez, she admitted that she "did breach the confidentiality agreement." Ex. N.1. In her written statement, Ms. Gamble said she "did breach the notice of confidentiality," she informed several coworkers that "they would not be receiving a call, or an appointment with an investigator," and her "primary premise in notifying other females impacted by the investigation's outcome was solely to advise no further investigative, fact-finding activity would be forthcoming." Ex. O. These statements established the violation of the old Notice, for which Ms. Gamble received the warning. They do not, however, suggest that she had engaged in any concerted protected activity. In particular, none of the information available to the investigators or relied on for the warning disclosed that Ms. Gamble asked or encouraged other employees to take any action, or that she engaged in any communications about the investigation with the object of initiating, inducing, or preparing for group action. In short, Ms. Gamble was not disciplined for concerted protected activity.

As noted, the Acting General Counsel submitted evidence that—unbeknownst to the Boeing investigators and decision-makers—Ms. Gamble may indeed have engaged in concerted communications with coworkers. Specifically, on July 3, 2012, she sent several coworkers two emails encouraging concerted action (SOF ¶ 25; Exs. K, L), and she secretly "blind copied" her July 11, 2012, response to Ms. Sanchez to these same individuals. SOF ¶ 27; Ex. N.2. It is undisputed that Boeing had no knowledge of these communications during the investigation and they played no role in the written warning. Accordingly, protected conduct was not a "motivating factor" in Boeing's decision to issue a written warning. *See Wright Line*, 251 NLRB 1083, 1089 (1980).[19]

The record also contains no evidence that any other employee was aware that Ms. Gamble was investigated or disciplined for violating the old Notice. There is no factual

[19] On this basis, Boeing has filed Exception 16, to the finding that "a preponderance of the evidence establishes that the Company was, in fact, sufficiently aware of the concerted nature of Gamble's admitted post-investigation communications" (Decision at 8:35-37), and Exception 17 to the finding that "Stroscheim's July 9 email to Sanchez" erased "any doubt about whether any of the four supported Gamble's complaints (Decision at 8:43-46).

basis for any claim that Ms. Gamble's written warning interfered with any other employee's exercise of Section 7 rights. In particular, the record contains no factual support for the ALJ's finding that the written warning issued to Ms. Gamble could "chill" other employees from engaging in concerted protected activity. Decision at 8:14-16.[20]

2. If Boeing Violated Section 8(a)(1) by Issuing the Warning, It Promptly and Effectively Cured That Violation

Between the time Ms. Gamble violated the old Notice and the time the warning was issued, the Board issued its decision in *Banner*. *See* Ex. Q. Boeing's Law Department learned of the warning after the Charge in this case was filed and served. SOF ¶ 32. Boeing immediately (that same week) rescinded and repudiated the warning and informed Ms. Gamble that it had done so. SOF ¶¶ 33-34; Ex. R. The ALJ's finding to the contrary is without support in the record and is contrary to the controlling law.[21]

For repudiation of allegedly unlawful conduct to be effective, it must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, adequately publicized to the employees involved, not followed by other proscribed conduct, and accompanied by assurances to employees that the employer will not interfere with the exercise of their Section 7 rights. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-39 (1978). *Passavant* standards are not to be applied in a "highly technical or mechanical manner," and voluntary remedial action by employers is to be encouraged. *Broyhill Co.*, 260 NLRB 1366 (1982).

Here, Boeing sufficiently repudiated its allegedly unlawful conduct. Boeing timely rescinded the written warning four days after it came to the attention of Boeing's Law

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[20] Exception 15 challenges this finding and the ALJ's erroneous assertion that "the Company does not contend otherwise." Decision at 8:14-16, 21-22. The ALJ's reliance on *Continental Group, Inc.*, 357 NLRB No. 39 (2011), as support for this finding is misplaced, as the second justification for the Board's *Double Eagle* rule is not implicated where, as here, it is not reasonable to infer that enforcement of a rule with respect to conduct that is not itself protected would chill the exercise of protected rights. *See id.,* slip op. at 3.

[21] Exception 18 challenges the ALJ's finding that "the Company failed to adequately repudiate the unlawful warning." Decision at 9:4-5.

Department. SOF ¶¶ 32-33; Ex. R. Boeing's repudiation of the warning was unambiguous and specific. Boeing explained that the warning was rescinded because "the National Labor Relations Board ruled that an employer cannot prohibit employees from discussing on-going employer investigations other than in specific, individualized circumstances." Ex. R. Boeing adequately publicized its repudiation by mailing it to Ms. Gamble directly. The record contains no evidence that any other employee was aware of the written warning, so there was no reason for Boeing to publicize its repudiation to a broader audience. Finally, Boeing replaced the old Notice form with the Revised Notice, which eliminated the potentially problematic language. Boeing's prompt and effective repudiation of the written warning thus passes *Passavant* muster, particularly because Boeing voluntarily rescinded the warning. *Broyhill Co.*, 260 NLRB at 1366.

Ms. Gamble's claim has been fully resolved by Boeing's prompt and unambiguous repudiation of the written warning.

E. Remedy Issues

If (as it maintains) Boeing did not violate the Act, there is of course no basis for any remedy.[22] Moreover, even if the Board finds one or more violations, the record in this case does not support a general posting remedy or the Order recommended by the ALJ.[23]

There is no evidence that either the old Notice or the Revised Notice was ever published or disseminated to Boeing employees generally. Rather, the record can only support a finding that these forms were known to the small minority of employees who were actually interviewed as witnesses in HR investigations. Accordingly, assuming that the use of one or both violated the law, no valid remedial purpose would be served by requiring remedial notice to any other employees. Any remedial notice concerning the old Notice should be restricted to those individuals who were actually given the old Notice form in connection with ongoing HR investigations between March 17, 2012, and October 2012. SOF ¶ 11; Ex. C ¶ 4(a); Joint Motion

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[22] Exception 21 challenges the ALJ's conclusion that *any* remedy is appropriate or required. Decision at 9:36-10:3.
[23] Exception 22 challenges the ALJ's conclusion that "a general posting remedy is appropriate." Decision at 9:42. Exception 23 challenges the ALJ's conclusion that the recommended Order should be issued by the Board. Decision at 10:10-11:17. *See also* Exception 23(d) (posting of Appendix A); Exception 23(e) (posting of Appendix B).

at 8, Issue 1. Similarly, any remedial notice concerning the Revised Notice should be restricted to those individuals who were actually given the Revised Notice form in connection with ongoing HR investigations since November 2012. SOF ¶ 12; Ex. C ¶ 4(b); Joint Motion at 8, Issue 2. Because this approach will ensure that all potentially affected employees receive actual notice, there is no valid remedial reason to require multiple forms of notice, a general posting, or general electronic notice.

There is no evidence that any employee other than Ms. Gamble herself was aware of her short-lived written warning. SOF ¶ 31; Ex. Q. Thus, even assuming the warning violated the Act, there is no valid remedial reason to require notice of that violation to any Boeing employee other than Ms. Gamble herself.[24]

The "cease and desist" language of the recommended Order is also problematic, as it is vague, ambiguous, and substantially overbroad.[25] As drafted, it provides no guidance to Boeing as to what conduct is and is not prohibited and would, read literally, prohibit a wide range of measures that the Board has itself approved. *See, e.g., IBM Corp.*, 341 NLRB at 1293.

Posting aside, the recommended Order would require affirmative relief that has no support in the record and would serve no valid remedial purpose. For example, it would require that Boeing, "to the extent it has not already done so, revise or rescind the [old Notice]." Decision at 10:28-30. This language is gratuitous, as it is undisputed Boeing has already voluntarily taken the recommended action. SOF ¶¶ 11-13; Exs. E, F.[26] The ALJ would also require that Boeing, "to the extent it has not already done so, rescind the unlawful August 9, 2012 written warning it issued to employee Joanna Gamble . . . and . . . advise her in writing that this has been done and that the warning will not be used against her in any way." Decision at 10:32-36. This language is also gratuitous, as it is undisputed that Boeing has already

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[24] Exception 23(d) challenges recommended Order language that would require Boeing to post Appendix A, which refers to Ms. Gamble's individual claim, at its facility in Renton, Washington. Decision at 10:38-39.
[25] *See* Exception 23(a).
[26] *See* Exception 23(b).

voluntarily taken the recommended action. SOF ¶¶ 33-34; Exs. Q, R.[27] Indeed, this recommended Order language reinforces the conclusion that Boeing has already fully addressed any potential violation related to Ms. Gamble herself, and no further order, action, or remedy is necessary or appropriate.

F. Authority Issues

Finally, Boeing submits that the Complaint was *ultra vires* and the Board's agents lacked legal authority to prosecute, hear, or decide this case. *See generally New Process Steel, LP v. NLRB*, 130 S. Ct. 2635, 2640, 2644-45 (2010); *Noel Canning*, 705 F.3d at 499-514; *New Vista Nursing & Rehab.*, 719 F.3d at 208, 244; *NLRB v. Enter. Leasing Co. Southeast, LLC*, __ F.3d __, 2013 WL 3722388, at *30, 40, 48 (4th Cir. July 17, 2013); *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-76 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3498 (2010); *Hooks v. Kitsap Tenant Support Servs., Inc.*, C13-5470 BHS, 2013 WL 4094344, at *1-2 (W.D. Wash. Aug. 13, 2013). These defects are matters for judicial determination, but are raised here to foreclose any claim of waiver.

Briefly, the jurisdictional defects with this case stem from the fact that, until July 30, 2013, the Board had lacked a quorum of three lawfully appointed Members since *at least* January 3, 2012, and hence lacked authority to take any action in this matter. *Noel Canning*, 705 F.3d at 499-514; *New Vista Nursing & Rehab.*, 719 F.3d at 208, 244. Nor could Board agents exercise previously delegated authority to carry out the duties of the Board when it lacked a quorum, *see Laurel Baye Healthcare of Lake Lanier, Inc.*, 564 F.3d at 472-76, and the Acting General Counsel lacked independent authority that could be delegated to others. *Hooks*, 2013 WL 4094344, at *1-2 (Acting General Counsel could not delegate authority to initiate legal action to Regional Director for Region 19 because Acting General Counsel was not validly appointed). Consequently, the appointment of the Regional Director for Region 19 and the issuance of Complaint in this case were void, the prosecution of this case by counsel for the

[27] *See* Exception 23(c).

Acting General Counsel was unlawful, the Administrative Law Judge lacked lawful authority to hear or decide this case, and the Decision was void *ab initio*.

VI. CONCLUSION

Boeing respectfully requests that the Board (a) reject each finding, conclusion, and recommendation in the Decision to which Boeing has filed an exception and (b) dismiss the charge.

DATED: August 23, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing BRIEF IN SUPPORT OF EXCEPTIONS FILED BY THE BOEING COM in the above-captioned matter, which is e-filed with the Board, was served electronically upon the persons shown below:

M. Anastasia Hermosillo at mary.hermosillo@nlrb.gov

Joanna Gamble at joanna.gamble@boeing.com

DATED: August 23, 2013

Debbie Coker
Legal Secretary