

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD**

THE BOEING COMPANY

and

Case 19-CA-089374

JOANNA GAMBLE, an Individual

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. Overview

Pursuant to §102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Counsel for the Acting General Counsel (“General Counsel”) submits this Answering Brief to The Boeing Company’s (“Respondent”) Exceptions to Administrative Law Judge Wedekind’s (“ALJ”) July 26, 2013, Decision in the above-captioned case (“ALJD”).¹ The ALJ found that Respondent violated § 8(a)(1) of the National Labor Relations Act (the “Act”) by maintaining two iterations (Original Notice and Revised Notice) of a confidentiality rule instructing employees not to talk about internal investigations, and disciplining its long-time employee Joanna Gamble (“Gamble”) for violating that rule while engaged in § 7 activity. (ALJD9:23-32). Respondent excepts to both the legal and factual findings made by the ALJ.

A. **The ALJ Properly Found that Respondent’s Original Notice Violated § 8(a)(1)**

Respondent’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)” (ALJD3:34-36) because the original notice contained a blanket confidentiality directive which “impermissibly infringe[s] on employees’ statutory right to discuss among themselves their terms and conditions of employment and otherwise engage in concerted protected activity.”² (ALJD2:35-39) The ALJ’s decision is consistent with well established precedent. *See, e.g., Banner Estrella Med. Ctr.*, 358 NLRB No. 93 (2012) (finding an HR consultant’s routine request to employees making a complaint not to discuss the matter with coworkers violates § 8(a)(1) because the prohibition has a reasonable tendency to coerce employees

¹ The Brief in Support of Respondent’s Exceptions to the ALJD will be referred to as (R. Br.) with citations to specific page numbers. References to the Stipulation of Facts will be designated as (SF __; __), including appropriate page and paragraph citations. References to the exhibits will be referred to as Ex.

² The Original Notice states: “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.” (Ex.I; ALJD2:6-29)

whether or not its characterized as a suggestion or an instruction; and the employer failed to meet its burden by showing the instruction was necessary to protect witnesses or prevent evidence tampering); *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011) (finding the employer violated § 8(a)(1) by promulgating, maintaining, or enforcing an oral rule prohibiting employees from discussing with others any matters under investigation by the HR department despite the employer's defense raising generalized concerns relating to witness protection, Equal Employment Opportunity Commission guidelines, and defamation liability); *Guardsmark, LLC*, 344 NLRB 809, 809 (2005), *enfd.* 475 F.3d 369 (2007); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) *enfd.* 203 F.3d 52 (1999). *See also Flex Frac Logistics, LLC*, 358 NLRB No.127, slip op. at 2 (2012).

Respondent makes the following arguments as to why the ALJ was wrong and the Original Notice does not violate § 8(a)(1) of the Act: (1) the language was not restrictive; (2) it was only issued to a small population, and there are no examples of chill (R. Br. 11-13); (3) it does not prohibit employee discussion of HR investigations because employees would know that “you are directed not to discuss this case with any Boeing employee” means they are allowed to discuss “any underlying facts, concerns, policies, or rules that might be implicated in the investigation” (R. Br.12); (4) it is not a companywide rule, as “it was only given to the relatively small population of employees who were actual complainants or witness in HR investigations” (R. Br.11); (5) there is “no evidence that [it] in fact ever chilled any employee in the exercise of Section 7 rights” (R. Br. 12); and (6) Respondent had substantial business reasons to keep its investigations confidential (R. Br. 9-11). Respondent is mistaken both factually and legally.

First, Respondent fails to explain how “facts, concerns, policies, or rules that might be implicated in [an] investigation” should not be considered part of a “case,” particularly when in

light of the construction of the Notice with its two express exceptions. Thus, there was nothing for the ALJ to address. Second, as to the “population” to whom distributed, Respondent’s argument is contradicted by the uncontested facts upon which the ALJ properly relied: from September 2011 through October 2012, Respondent routinely issued the Original Notice to employee witnesses in HR investigations in most of its facilities throughout the United States; and from September 2011 to June 2013, Respondent conducted over 1,000 HR investigations in the Commercial Airplane group alone. (ALJD3:6-36). Even if this hadn’t established clearly that the Original Notice is a company rule, as the ALJ correctly noted, Respondent admitted in its post-hearing brief that the Original Notice was “effectively a rule of conduct[.]” (ALJD2:33-34).

Third, as to Respondent’s contention regarding the lack of chill, maintenance and enforcement of the rule via Gamble’s unlawful discipline certainly rebuts that. (ALJD 7-9:25-2). *See also Farah Mfg. Co.*, 187 NLRB 601, 602 (1970) (the mere maintenance of an unlawful rule is sufficient to find a violation of § 8(a)(1)). Fourth, as the ALJ correctly determined in accord with established precedent, Respondent failed to prove it was substantially justified in maintaining the Original Notice because it only raised generalized confidentiality concerns, which are legally insufficient. (ALJD3:6-36). *See, e.g., Caesar’s Palace*, 336 NLRB 271, 272 (2001) (balancing test used to determine the lawfulness of a confidentiality rule imposed upon employee witnesses to employer-conducted investigations requires showing specific substantial business justification that outweighs employees’ right to discuss terms and conditions of employment). Respondent’s reliance on *IBM, Corp.* 341 NLRB 1288 (2004), and *NLRB v. Robbins Tire and Rubber Co.*, 437 US 214 (1978), is simply misplaced, as neither case concerns a workplace confidentiality rule.

Since the ALJ correctly found that the Original Notice contains an unlawful directive prohibiting employee witnesses from discussing ongoing HR investigations with other employees, the maintenance of this directive without a substantial justification violates § 8(a)(1), Respondent's exceptions regarding the Original Notice should be overruled.

B. The ALJ Properly Found that Respondent's Revised Notice Violated § 8(a)(1)

The ALJ found the Revised Notice language changing the wording of the prohibition to an ostensible "recommendation" to be equally unlawful because: (1) the language itself "suggests the Company's 'recommendation' should be treated as a 'request;'"³ (2) it "clearly communicates the Company's desire for confidentiality;" (3) its employee signature requirement "clearly communicated that its confidentiality concerns should be taken seriously;" and (4) "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." (ALJD4-5:40-7; internal quotations omitted). As such, under established precedent, the Revised Notice "would have a reasonable tendency to chill employees from exercising their statutory rights" (ALJD5:11-13). *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992) *enfd.*, 987 F.2d 1376 (8th Cir. 1992); *Heck's, Inc.*, 293 NLRB 1111 (1989); *Fresenius USA Mfg.*, 358 NLRB No. 138 (2012); *NLRB v. Koronis Parts, Inc.*, 927 F. Supp. 1208 (D. Minn. 1996).

Despite this well-founded reasoning, Respondent asserts the ALJ erred because: (a) the Revised Notice is not a rule or, conversely, if it is a rule, it is not one that may "be read to prohibit protected concerted activity;" (R. Br.14); (b) the "need to know" language of the Revised Notice serves as an advisory and means employee witnesses may disclose information

³ The ALJ noted that Respondent conceded this point in its brief. (ALJD4:40-43).

about the case under investigation to “persons the employee believes have a legitimate need to know, including other employees with whom they may have common cause” (R. Br. 16); (c) the recommendation that employees not discuss and refer inquiries to Human Resources necessarily denotes that it is “helpful advice for an employee who prefers not to discuss a sensitive personnel matter with others” and not a statement cementing Respondent’s desire that employees not discuss HR investigations (R. Br.16-17); and (d) the caption on the Revised Notice and the fourth paragraph “clearly distinguish the permissive and mandatory aspects of the Revised Notice[.]” (R. Br. 17). Respondent arguments are flawed.

First, Respondent relied on inapposite cases in support of its assertion that the Revised Notice is not a rule. *Praxair Distribution, Inc.*, 357 NLRB No. 91 (2011), is inapt – unlike here, the employer there put forth actual evidence of a legitimate concern of both destruction of evidence and fabricated testimony when it requested an employee not talk about an on-going investigation.⁴ Similarly, *Caesar’s Palace*, 336 NLRB at 273-75, is inapplicable as to this issue because the employer never claimed its oral directive to employee witnesses involved in the ongoing workplace illegal drug activity investigation was anything other than a rule. Respondent compounds its error by ignoring most of the legal precedent relied upon by the ALJ, and selectively arguing that *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), should not apply as the prohibition on employee discussion of wages in that case used a graphic to illustrate its point.⁵ (R. Br. 18).

Second, in order to support its exception regarding the “proper” construction of the Revised Notice, Respondent performs complex linguistic construction gymnastics. Its argument

⁴ The ALJ’s finding that the employer in *Praxair* met its substantial business burden is not controlling, as the Board did not review that part of the decision on exceptions. *Id.* at 1, n.1

⁵ See also page 18 of Respondent’s brief for its discussion of footnote 2 of *Radisson Plaza Minneapolis* as a further example of Respondent’s selective reading of that case.

that employees should somehow be able to divine when the Revised Notice prohibits employee discussion of HR investigations (R. Br. 16) is simply convoluted. In addition, it conflicts with the uncontested fact, which the ALJ relied upon, that Respondent routinely asks employee witnesses in HR investigations to sign the Revised Notice throughout its facilities in the United States. (ALJD4:28-29). Further, its construction of the “need to know” argument as “advisory” only (R. Br. 16) was fully addressed and properly rejected by the ALJ, who found the reference to disclosing information “clearly refers to the investigator disclosing information on a need to know basis, not the employee witness doing so.” (ALJD6:7 n.6). Moreover, its arguments regarding the Human Resource referral, caption, and fourth paragraph seems plucked out of thin air, as there is nothing in the Revised Notice stating that any of its prescriptions are merely advisory. As such, Respondent’s exceptions should be overruled and the ALJ’s reading of the rule as coercive consistent with Board law affirmed. *See e.g., Flex Frac Logistics*, 358 NLRB No. 127, slip op at 2; *Banner Estrella Med. Ctr.*, 358 slip op. at 2; *Franklin Iron & Metal Corp.*, 315 NLRB 819, 820 (1994), *enfd.*, 83 F.3d 156 (6th Cir. 1996); *Radisson Plaza Minneapolis*, 307 NLRB 94; *Waco, Inc.*, 273 NLRB 746, 748 (1984).

C. The ALJ Properly Found Respondent’s Discipline of Gamble Violates § 8(a)(1) and that Respondent Did Not Cure the Violation

The ALJ found that Gamble’s discipline violated § 8(a)(1) under two different theories: Gamble engaged in protected concerted activity (that did not interfere with Respondent’s operations) when she violated the Original Notice (ALJD8:21-46); and, consistent with *Continental Group, Inc.*, 357 NLRB No. 39 (2011), and *Taylor Made Transp. Svcs*, 358 NLRB No. 53 (2012), because her “conduct is of a type that implicates concerns underlying the Act, and the discipline could therefore chill employees from exercising similar conduct that constitutes concerted protected activity.” (ALJD8:14-16). Respondent excepts to these findings,

making the same arguments already properly rejected by the ALJ. (*See* ALJD 8:35-37). Each is addressed in turn.

Respondent's denial of knowledge regarding Gamble being disciplined for engaging in protected concerted activity is simply unsupported by the facts: the original email prompting an investigation into Carroll's behavior stated that the complaints were a matter of group concern (Ex.H); Gamble's May 16 email was sent "to numerous BCA Engineering managers and executives" all of whom are admitted supervisors within the meaning of § 2(11) of the Act (SF5:18); Stroschein's July 9 email stating she shared the concerns raised by Gamble and questioned why she had not also been contacted as a witness in the Carroll investigation initiated by Gamble (Ex.M); Respondent's July 11 email, warned Gamble that the Notice may have been breached, having already found out about her discussion with Stroschein, whose email it had received; and the Gamble's discipline received clearly acknowledges ". . . you discussed the investigation with others." (Ex. Q).

Respondent's disagreement with the ALJ as to the first theory also holds for the second. Specifically, Respondent argues that there is no evidence that other employees were aware of Gamble's discipline so it could not have chilled other employees' § 7 activity. Again, Respondent is factually in error. As an initial matter, there is clear evidence that Gamble's coworkers knew she was subject to discipline for violating the terms of the Original Notice because she blind copied Stroschein, Ingraham, and Rainbow on her response to Sanchez's July 11 email, in which she admitted breaching the Original Notice. (Ex. N2). Moreover, Respondent produced no evidence of the only circumstance under which it could be relieved of liability when faced with allegations implicating such concerns – establishing that the employee was disciplined for interference with production or operations, with a citation to these reasons,

not the mere violation of the unlawful rule, when it issues the discipline. *Continental Group, Inc.*, 357 NLRB No. 39 (2011). Since Respondent has never given another reason for Gamble's discipline other than breach of the Original Notice, it was, as the ALJ properly found, in clear violation of the Act. (ALJD 8:21-34).

Finally, Respondent contends that it cured any arguable § 8(a)(1) of the Act by rescinding Gamble's discipline and replacing the Original Notice with the Revised Notice. That argument is no more persuasive now than it was before the ALJ. (ALJD9:4-19). As the ALJ correctly identified, *Passavant Memorial Hospital*, 327 NLRB 138, 138-39 (1978), sets forth the criteria required for effective repudiation under the Act – it must be: (1) timely; (2) unambiguous; (3) specific in nature to the coercive conduct; (4) free from other proscribed illegal conduct; (5) adequately publicized to the involved employees; (6) in an environment where the employer has not engaged in proscribed conduct after the publication; and (7) with assurances, by the employer, to its employees that it will not interfere with § 7 rights in the future. (ALJD9: 10). Respondent, according to the ALJ, clearly did not satisfy these criteria.

Respondent contends that the rescission of Gamble's discipline was timely because it occurred four days after the legal department learned of the warning, that the Revised Notice removed the potentially unlawful language from the Original Notice, and there is no evidence that other employees knew of Gamble's discipline so there was no further need to give notice. Addressing each in turn, Respondent's arguments are not persuasive.

Respondent contends the rescission was timely. Despite this contention, it fails to cite any case law finding the date an employer's legal department learned of a discipline to be relevant to the repudiation analysis. Respondent proffers nothing to call into doubt the ALJ's

correct finding that rescission of Gamble’s discipline seven weeks after its issuance occurred far too long after the violation to be considered timely. (ALJD 9:11-14).

Respondent also continued to engage in the proscribed conduct after publication by routinely requiring “employee witnesses in HR investigations to sign a revised confidentiality notice that is just as unlawful as the original under prevailing Board law.” (ALJD 9: 15-18). As discussed in the ALJD and earlier in this brief, the Revised Notice is as unlawful as the Original. Thus, there was no out to be found for its violation in this regard.

Finally, since Stroschein, Ingraham and Rainbow knew that Gamble was potentially subject to discipline for talking to them about the results of the HR investigation (Ex. N2), and there was no evidence adduced that Respondent ever refuted this, the ALJ’s finding must stand. As the ALJ eloquently stated, Respondent “never provided assurances that it would not interfere with employee statutory rights in the future.” (ALJD9:18-19).

D. The ALJ’s Remedial Order Appropriately Addresses the Violations Found

It is uncontested fact that from September 2011 to June of 2013, Respondent conducted over 1,000 HR investigations in its Commercial Airplane group *alone* involving an unknown amount of witnesses, in an unknown amount of locations. The ALJ accordingly found that nationwide posting of the Board notice would be appropriate because Respondent used the Original and Revised Notices, not only for the Commercial Airplane group, but at most of its facilities across the country. (ALJD2:31-32; 4:25-29). However, recognizing that Gamble’s situation was more isolated, he reasonably required that a second Board notice containing language regarding Gamble’s discipline only be posted at Respondent’s Renton facility where Gamble worked. The ALJ’s remedial order is consistent with Board law. *Banner*, 358 NLRB No. 93, slip op. at 2, n.2; *Guardsmark, LLC*, 344 NLRB at 812.

However, Respondent contends that there should be three discrete Board notices, distributed selectively as follows: one to only those employees who received the Old Notice; one to only those employees who received the Revised Notice; and one to Gamble. Respondent's contention is neither consistent with, nor supported by any proffered, Board law nor practical. As such, its exceptions as to the remedy should be denied.

E. The NLRB Has the Authority to Prosecute, Hear, and Decide the Merits of this Case

Citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281), *Hooks v. Kitsap Tenant Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), and other cases, Respondent challenges the authority of the Board to issue complaints or to designate its agent to issue complaints. As discussed below, Respondent is incorrect.

It is correct that *Noel Canning* held that former Members Griffin and Block, then current Board members serving alongside Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess. However, the Supreme Court has granted the Board's petition for certiorari of *Noel Canning*. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning*, 705 F.3d at 505, 509-10 with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (*en banc*); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until

such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.”⁶ *Belgrove*, 359 NLRB No. 77, slip op. at 1, n.1.

Moreover, regardless of the issue of the Board’s composition, the Acting General Counsel has independent authority to issue and prosecute complaints. *Bloomington’s, Inc.*, 359 NLRB No. 113, slip op. at 1 (Apr. 30, 2013) (“[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel.”) (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, “[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any ‘power delegated’ by the Board, but rather directly from the language of the NLRA.” *Id.* Accordingly, contrary to Respondent, the Acting General Counsel’s authority to issue and prosecute the complaint, is unaffected by any issue concerning the composition of the Board.

II. Conclusion

Based on the foregoing, it is respectfully submitted that the Board should deny Respondent’s Exceptions in their entirety and adopt the ALJ’s findings of fact and conclusions of law that Respondent violated § 8(a)(1) of the Act.

⁶ The Third Circuit’s decision in *NLRB v. New Vista Nursing & Rehabilitation*, ___ F.3d ___, 2013 WL 2099742 (3d Cir. May 16, 2013) and the Fourth Circuit’s decision in *NLRB v. Enterprise Leasing Co. Southeast, LLC*, ___ F.3d ___, 2013 WL 3722388 (4th Cir. July 17, 2013), should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

Dated at Seattle, Washington, this 6th day of September, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision was served on the 6th day of September, 2013, on the following parties:

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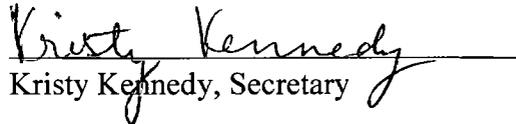
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