

Nos. 15-72894 & 15-73101

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE BOEING COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-
APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of The Boeing Company (“Boeing”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Order issued against Boeing on August 27, 2015, and reported at 362 NLRB No. 195. The Board’s Decision and Order is final under Section 10(e) and (f) of the National Labor Relations Act (“the Act”), as amended, 29 U.S.C. § 151 et seq., 160(e) and (f).

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act, 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices. Boeing's petition for review and the Board's cross-application for enforcement are timely, as the Act places no time limitation on such filings. This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), and venue is proper because Boeing transacts business in the State of Washington.

STATEMENT OF ISSUES

1. The Board found that Boeing violated Section 8(a)(1) of the Act by maintaining the original and revised confidentiality notices, and by disciplining employee Joanna Gamble pursuant to the former. The issues are:
 - a) Whether the Board is entitled to summary enforcement of the uncontested cease-and-desist and rescission portions of its Order that correspond to its unchallenged findings regarding the original notice and Gamble's discipline;
 - b) Whether the Board reasonably found that the revised confidentiality notice was unlawful.
2. Whether the Board's acted within its broad remedial discretion in requiring a notice-posting remedy.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that Boeing violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by maintaining an unlawful confidentiality notice, disciplining employee Joanna Gamble pursuant to that policy, and replacing that notice with a revised—but still unlawful—notice. Boeing does not dispute that it violated the Act by maintaining the original notice and disciplining Gamble under its unlawful terms. Nor does Boeing challenge the Board's remedial Order insofar as it directs Boeing to cease and desist from maintaining its original confidentiality notice and disciplining employees for violating such overbroad directives, and to rescind the notice and the unlawful written warning issued to employee Gamble. However, Boeing disputes the Board's finding that the revised notice was unlawful and challenges the Board's remedial Order insofar as it directs Boeing to post remedial notices. The procedural history of this case and the Board's factual findings are summarized below.

I. PROCEDURAL HISTORY

On January 29, 2013, after investigating an unfair-labor-practice charge filed by employee Gamble, the Board's General Counsel issued a complaint alleging that Boeing violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by maintaining the original and revised confidentiality notices and by disciplining Gamble pursuant to the former. (ER 9; SER 1-10.)¹ The parties waived a hearing and submitted the case on a stipulated record. (ER 9; ER 15.) On July 26, 2013, an administrative law judge issued a recommended order finding that Boeing violated the Act as alleged. (ER 8-14.)

II. THE BOARD'S FINDINGS OF FACT

A. Boeing Introduces the Original Confidentiality Notice

Beginning in September 2011, Boeing maintained the following confidentiality notice ("the original notice"):

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.

¹ Citations are to the Excerpts of Record ("ER") filed with Boeing's opening brief and Supplemental Excerpts of Record ("SER") filed with this brief. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Boeing's opening brief; "NBr." refers to the brief filed by the National Association of Manufacturers ("NAM") as *Amicus Curiae*.

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 person(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, 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. . . .

(ER 2; ER 18 ¶ 11, ER 24.) At most of its locations across the country, Boeing routinely issued copies of the original notice to management and employee witnesses taking part in investigations led by its human-resources department (“HR”). (ER 2; ER 18 ¶ 11.)

B. Boeing Disciplines Joanna Gamble for Discussing her Complaint with Coworkers, in Contravention of the Original Confidentiality Notice

At all relevant times, Joanna Gamble was a Boeing employee working in its Renton, Washington facility. (ER 10; ER 18 ¶ 15.) In May 2012, Gamble filed a complaint with HR alleging that a male supervisor made repeated inappropriate comments about gender, race, and age. (ER 10-11; ER 19 ¶¶ 17-18, SER 11-12.) HR initiated an investigation of Gamble’s allegations, as part of which Gamble signed a copy of the confidentiality notice. (ER 11; ER 19-20 ¶¶ 20-23, SER 13.)

In July 2012, HR issued a report concluding that Gamble’s allegations were “not substantiated.” (ER 11; ER 20 ¶ 23, SER 14-21.) However, Gamble learned that HR had not interviewed several coworkers, whom she had identified as having

witnessed the behavior in question. (ER 11; ER 20 ¶ 24.) Gamble sent those coworkers e-mails suggesting they ask HR why they were not interviewed. (ER 11; ER 20 ¶ 25, SER 22-24.) One of them, Amber Stroschein, e-mailed HR to express her disappointment that no one had contacted her, as well as her concerns about the integrity of the investigation and the effect of the report on employee morale. (ER 11; ER 20 ¶ 26, SER 25-26.)

Two days after Stroschein's e-mail, Gamble received an e-mail from HR informing her that she may have breached the confidentiality notice by speaking about the investigation to coworkers. (ER 11; ER 20-21 ¶ 27, SER 27-28.) After a second investigation, HR issued a new report in August 2012, which found that Gamble had breached the confidentiality notice. (ER 11; ER 21 ¶¶ 28-30, SER 29-32.) Boeing gave Gamble a written warning that future violations could result in corrective action, up to and including discharge. (ER 11; ER 21 ¶ 31, SER 33.)

On September 17, 2012, Gamble filed a charge with the Board alleging that Boeing violated the Act by disciplining her for discussing the terms and conditions of her employment with coworkers. (ER 11; SER 1.) On October 1, Boeing informed Gamble that it had rescinded the warning from her record. (ER 11; ER 22 ¶ 34, SER 34.) Boeing explained that its decision was based on a recently issued Board decision holding that employers could not prohibit employees from

discussing ongoing investigations except in specific, individualized circumstances.² (ER 11; ER 22 ¶ 34, SER 34.)

C. Boeing Rescinds the Original Notice and Introduces a Revised Version

In November 2012, Boeing introduced a revised confidentiality notice (“the revised notice”). (ER 3; ER 18 ¶ 12.) Boeing has not publicized the rescission of the original notice or its replacement with the revised version. (ER 18 ¶ 13.) The revised notice states as follows:

Human Resources Generalist 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 person(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. . . .

(ER 3; ER 18 ¶ 12, ER 25 (emphases added).)

² The Board found that Boeing’s letter referred to *Banner Estrella Medical Center*, 358 NLRB 809 (2012), *vacated and remanded*, Nos. 12-1359 & 12-1377 (D.C. Cir. Aug. 1, 2014), *adopted with modifications by Banner Estrella Medical Center (Banner)*, 362 NLRB No. 137, 2015 WL 4179691 (June 26, 2015), *pet. for review filed*, No. 15-1245 (D.C. Cir. July 30, 2015).

At most of its locations across the country, Boeing routinely asks management and employee witnesses to sign copies of the revised notice when participating in HR investigations. (ER 3; ER 18 ¶ 12.) HR conducted over a thousand investigations in Boeing's commercial airplane group alone between September 2011 and June 2013. (ER 9; ER 18 ¶ 14.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 27, 2015, the Board (Chairman Pearce, Members Hirozawa and Johnson) issued a Decision and Order finding, in agreement with the judge, that Boeing violated Section 8(a)(1) of the Act by maintaining the original confidentiality notice and by disciplining Gamble pursuant to it. (ER 1-3 & n.5.) The Board also found (Chairman Pearce and Member Hirozawa; Member Johnson, dissenting) that Boeing's revised notice was unlawful as well. (ER 3-5.)

The Board's Order requires Boeing to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (ER 13.) Affirmatively, the Order requires Boeing to revise or rescind the confidentiality notices in effect immediately prior to and since November 2012, rescind Gamble's discipline and advise her that it will not be used against her in any way (to the extent that Boeing has not already

done so), and post copies of two different remedial notices, one for its Renton facility and the other for all of its facilities nationwide. (ER 13.)

SUMMARY OF ARGUMENT

The ability of employees to communicate about their terms and conditions of employment is a foundational form of concerted activity, and a cornerstone of the rights protected by Section 7 of the Act. Under established Board law, the right to discuss terms and conditions of employment includes the right to exchange information about workplace investigations. Furthermore, Section 8(a)(1) of the Act makes it unlawful for an employer to maintain a workplace policy that restricts its employees' Section 7 rights, unless the employer provides a legitimate and substantial business justification that outweighs the employees' interest in exercising their rights. Under settled law, the employer is responsible for balancing those competing interests on a case-by-case basis. Accordingly, a blanket confidentiality rule suppressing employee discussion of all workplace investigations is unlawful.

In this case, the Board reasonably found that Boeing interfered with its employees' exercise of their protected rights, and violated Section 8(a)(1) of the Act, by maintaining two confidentiality notices that imposed blanket restrictions on employees' discussion of workplace investigations. The Board also reasonably found that Boeing unlawfully interfered with employee Gamble's exercise of her

protected rights by disciplining her for discussing her discrimination complaint with coworkers in contravention of the original confidentiality notice.

Boeing does not dispute that it violated the Act by maintaining the original notice, and that it disciplined Gamble under that unlawful notice. Nor does Boeing challenge the Board's remedial Order insofar as it directs Boeing to cease and desist from those unfair labor practices, and to rescind the original notice and Gamble's discipline. Accordingly, the Board is entitled to summary enforcement of the relevant portions of its Order.

Instead, Boeing contests the Board's finding that the revised notice is unlawfully overbroad, but Boeing's defense hinges on convincing the Court that the minimal wording changes in the revised notice suffice to alter its entire meaning. The Board rightly rejected that argument, and so should the Court. Consistent with its precedent, the Board found that substituting the words "we recommend" for "you are directed" in the revised notice would not keep employees from reasonably construing the notice as a muzzle impeding their ability to discuss workplace investigations. As the Board explained, the revised notice as a whole conveys the sense that employees are not free to disregard Boeing's "recommendation." Boeing's objections ignore the fundamental realities of employment relationships and assume that employees approach employment

contracts like attorneys trained to parse and analyze their contents—hardly a realistic expectation.

Furthermore, the Board reasonably found that Boeing in its defense failed to establish any legitimate and substantial business justification for its blanket infringement of its employees' right to discuss workplace investigations. The arguments Boeing offers on review are not properly before the Court, as Boeing did not present them to the Board. In any event, even if the Court were to reach those barred issues, as the Board found, under the revised notice Boeing admittedly failed to assess the need for confidentiality on a case-by-case basis, as the law requires. Therefore, Boeing's blanket prohibition is not tailored to the specific needs of a particular investigation, and thus needlessly infringes on its employees' Section 7 rights. Moreover, none of Boeing's proffered business justifications for maintaining a blanket policy withstands scrutiny.

Finally, the Board did not abuse its broad remedial discretion in ordering a nationwide notice posting regarding the original and revised notices. Because Boeing maintained its confidentiality policy companywide and distributed the notices to all employee witnesses participating in workplace investigations, the scope of the remedy is commensurate with the violation, and the Court has consistently enforced similar Board orders in such situations. The Board's notice-

posting order with regard to Gamble's unlawful discipline was also well within its remedial discretion.

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT BOEING VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING BOTH CONFIDENTIALITY NOTICES AND BY DISCIPLINING GAMBLE

A. Standard of Review

“The Board has the primary responsibility for applying the general provisions of the Act to the complexities of industrial life.” *Pattern Makers’ League of N. Am., AFL-CIO v. NLRB*, 473 U.S. 95, 114 (1985) (quotation marks and citation omitted). Notably, the Supreme Court has “often reaffirmed that the task of defining the scope of [Section] 7 is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.” *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (quotation marks and citation omitted). Accordingly, courts defer to the Board’s policy choices “where its interpretation of what the Act requires is reasonable, in light of the purposes of the Act and the controlling precedent of the Supreme Court.” *United Food & Commercial Workers Int’l Union, AFL-CIO, Local 150-A v. NLRB*, 880 F.2d 1422, 1429 (D.C. Cir. 1989) (citing *Pattern Makers*, 473 U.S. at 95) (other citation omitted).

This Court accords considerable deference to the Board’s interpretation of the Act so long as it is “reasonably defensible.” *Wash. State Nurses Ass’n v. NLRB*, 526 F.3d 577, 580 (9th Cir. 2008) (citation omitted). Additionally, the Court will uphold the Board’s factual findings if they are supported by substantial evidence on the record as a whole. 29 U.S.C. §160(e); *Int’l Bhd. of Elec. Workers, Local 21 AFL-CIO v. NLRB*, 563 F.3d 418, 422 (9th Cir. 2009). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Recon Refractory & Const. Inc. v. NLRB*, 424 F.3d 980, 986 (9th Cir. 2005).

B. It Is Unlawful for an Employer To Maintain a Confidentiality Rule that Restricts Employees’ Section 7 Right To Discuss Workplace Investigations Absent a Case-by-Case Showing of a Legitimate Business Justification for the Restriction

Among other rights, Section 7 of the Act guarantees employees the right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection” 29 U.S.C. § 157. The Board has long recognized “the importance of freedom of communication to the free exercise of organization rights.” *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Accordingly, and with judicial approval, the Board has read Section 7 to protect an employee’s right to “discuss the terms and conditions of her employment with other employees,” *Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007), as well as “the terms of employment

of [her] fellow employees,” *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, 2014 WL 3919910, at *16 (Aug. 11, 2014), *enforced*, 468 F. App’x 1 (D.C. Cir. 2012).

The Section 7 right to discuss terms and conditions of employment necessarily extends to conversations about workplace investigations. As the Board emphasized in *Inova Health System*, “[i]t is well established that employees have a Section 7 right to discuss discipline or disciplinary investigations with fellow employees.” 360 NLRB No. 135, 2014 WL 3367243, at *9 (June 30, 2014) (citation omitted), *enforced*, 795 F.3d 68, 85 (D.C. Cir. 2015); *see also Caesar’s Palace*, 336 NLRB 271, 272 (2001) (same). Likewise, in *Hyundai America Shipping Agency, Inc. v. NLRB*, the D.C. Circuit, enforcing a similar Board order, explained that a “rule prohibiting employees from revealing information about matters under investigation . . . clearly limit[s] employees’ [Section] 7 rights to discuss their employment” 805 F.3d 309, 314 (D.C. Cir. 2015); *see also* cases discussed *infra* pp. 16-18.

Section 8(a)(1) of the Act makes it an unfair labor practice for employers to “interfere with, restrain, or coerce employees in the exercise of [their Section 7] rights[.]” 29 U.S.C. § 158(a)(1). Therefore, an employer violates Section 8(a)(1) when it maintains a workplace rule that reasonably tends to restrain or interfere with employees in the exercise of their Section 7 rights. The “mere maintenance”

of an unlawful rule violates the Act, even without evidence of enforcement.

Cintas, 482 F.3d at 467-68; *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014).³

To maintain a rule that employees reasonably could construe as restricting Section 7 rights, the employer bears the burden to show that the rule fulfills a “legitimate and substantial business justification” that outweighs its employees’ interest in exercising those rights.⁴ *Caesar’s Palace*, 336 NLRB at 272 & n.6 (citing *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976)); *Waco, Inc.*, 273 NLRB 746, 748 (1984). Moreover, the rule must be tailored to serve the employer’s interest; even if legitimate, that interest will not outweigh the burden on Section 7 rights if “[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient.” *Cintas*, 482 F.3d at 470; *see also Guardsmark, LLC v. NLRB*, 475 F.3d 369, 380 (D.C. Cir. 2007) (explaining that an

³ Under established Board law, a rule that explicitly restricts Section 7 conduct is invalid on its face. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). Otherwise, the rule will be found invalid if: “(1) employees would reasonably construe the language [of the rule] to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647.

⁴ The employer bears the burden to establish the need for confidentiality “because its knowledge of both the shop floor and scope of the investigation allows it to weigh whether confidentiality is justified in a particular instance.” *Banner*, 2015 WL 4179691, at *5; *see also Am. Girl Place N.Y.*, 355 NLRB 479, 480 n.5 (2010) (explaining that “placing the burden of proof on the [employer] is . . . practical” when “the [employer] has superior access to the relevant evidence” (quotation marks omitted)).

employer “ha[s] an obligation to demonstrate its inability to achieve [its] goal with a more narrowly tailored rule that would not interfere with protected activity”).

When the policy in question consists of requesting that employees maintain confidentiality regarding workplace investigations, the employer must show that its request is “based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality.” *Banner*, 2015 WL 4179691, at *5; *see also Hyundai Am. Shipping Agency, Inc.*, 357 NLRB 860, 874 (2011), *enforced in relevant part*, 805 F.3d 309 (D.C. Cir. 2015). That assessment must be done “on a case-by-case basis[, as t]he employer cannot reflexively impose confidentiality requirements in all cases or in all cases of a particular type.” *Banner*, 2015 WL 4179691, at *5. A blanket policy of requesting confidentiality in every investigation is thus unlawfully overbroad. *Hyundai*, 805 F.3d at 314. Likewise, an employer’s stated reason for requesting confidentiality cannot be “broad and undifferentiated,” *id.*, or “applied generically,” *SNE Enters., Inc.*, 347 NLRB 472, 493 (2006), *enforced*, 257 F. App’x 642 (4th Cir. 2007).

With judicial approval, the Board has consistently applied those principles to determine whether confidentiality policies regarding workplace investigations violate the Act. In *Caesar’s Palace*, for example, an investigation into allegations of drug dealing and theft in the workplace raised concerns about “management coverup and possible management retaliation, as well as threats of violence.”

336 NLRB at 271-72. Responding to those concerns, the employer imposed a confidentiality rule “to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated.” *Id.* at 272. The Board found that the employer established a legitimate and business justification for its rule, which, “in the circumstances of th[at] case, . . . outweigh[ed] the rule’s infringement on employees’ rights.” *Id.* In *Hyundai*, by contrast, the Board found that the employer in violated Section 8(a)(1) by routinely requiring confidentiality about matters under investigation “without any individual review to determine whether such confidentiality is truly necessary.” 357 NLRB at 874. The D.C. Circuit agreed, holding that the employer’s stated interest in complying with anti-discrimination statutes and guidelines did not justify a ban on “discussions of *all* investigations, including ones unlikely to present these concerns.” 805 F.3d at 314.⁵ *See also, e.g., Phoenix Transit Sys.*, 337 NLRB 510, 510, 513 (2002) (employer’s instruction to employees not to discuss complaints about sexual harassment amongst themselves found unlawful where employer’s asserted

⁵ Boeing errs by asserting that in *Hyundai*, the D.C. Circuit “refused to endorse a requirement of individualized . . . showings to support mandating confidentiality.” (Br. 28.) Rather, the Court simply held that Hyundai’s confidentiality rule “was so broad and undifferentiated that Hyundai did not present a legitimate business justification for it.” 805 F.3d at 314. Boeing gains no more ground by quoting (Br. 28) dicta in *Hyundai* where the Court stated that it did not need to endorse a view that one of four specific circumstances must exist in order to justify a confidentiality request. 805 F.3d at 314. As the Board subsequently explained in *Banner*, other circumstances could also justify a confidentiality request. 2015 WL 4179691, at *4 nn.8, 10, *6, 8-9.

justification—anti-harassment policy’s success depended on confidentiality—lacked evidentiary support), *enforced*, 63 F. App’x 524 (D.C. Cir. 2003); *Mobil Oil Expl. & Producing, U.S., Inc.*, 325 NLRB 176, 178 (1997) (employer’s confidentiality interest found “exceedingly minimal” where employee under investigation already knew he was under scrutiny and there was no risk of compromising the investigation), *enforced*, 200 F.3d 230 (5th Cir. 1999).

C. The Board Is Entitled to Summary Enforcement of Its Order Directing Boeing To Cease and Desist from Maintaining the Original Notice and Disciplining Employees, and To Rescind the Notice and Gamble’s Written Warning

An employer that maintains a rule prohibiting employees from discussing disciplinary investigations violates Section 8(a)(1) of the Act, unless the employer can show “a legitimate and substantial business justification that outweighs employees’ Section 7 rights.” *Banner*, 2015 WL 4179691, at *3. Boeing’s original notice states that employees are “directed not to discuss [a case under investigation] with any Boeing employee other than company employees who are investigating th[e] issue or [a] union representative,” and to inform other employees who want to talk about the case that they “have been instructed not to discuss it.” (ER 2; ER 18 ¶ 11, ER 24.) The Board reasonably found that the notice unlawfully imposed a blanket confidentiality directive prohibiting employees from discussing disciplinary investigations, given Boeing’s failure to

articulate a legitimate and substantial business justification for imposing such a restriction. (ER 2, 9-10.)

Section 8(a)(1) also prohibits employers from disciplining employees pursuant to an unlawfully overbroad rule. *See Continental Grp., Inc.*, 357 NLRB 409, 412 (2011). It is undisputed that Boeing issued Gamble a written warning for breaching the original confidentiality notice when she spoke to coworkers about the investigation into her discrimination complaint. (ER 11; ER 20-21 ¶¶ 27-31, SER 27-33.) Accordingly, the Board reasonably found that Gamble's discipline was unlawful under *Continental Group*.⁶ (ER 2 n.5, 10-12.)

Boeing does not dispute either of these findings before this Court, or the portions of the Board's Order relevant to those findings.⁷ (ER 13.) Boeing's failure to challenge those rulings means that "the Board's finding of those unfair labor practices violations must be taken as established." *NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000) (quotation marks

⁶ In *Continental Group*, the Board explained that "[d]iscipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." 357 NLRB at 412 (clarifying rule enounced in *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enforced*, 414 F.3d 1249, 1257-58 (10th Cir. 2005)). The Board found that Boeing's written warning to Gamble was unlawful under either prong of the *Continental Group* test. (ER 2 n.5.)

⁷ Boeing only disputes the notice-posting portion of the Board's Order as to both of these uncontested unfair-labor-practice findings. We address Boeing's arguments below (pp. 44-50.)

and citation omitted). Accordingly, the Board is entitled to have this Court uphold its findings that Boeing violated Section 8(a)(1) of the Act by maintaining the original notice and disciplining Gamble pursuant to it. The Board is also entitled to summary enforcement of the portions of its Order (ER 13) directing Boeing to cease and desist from maintaining the original notice, and from disciplining employees pursuant to that notice, and to rescind the notice and Gamble's written warning. *See, e.g., NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126 (9th Cir. 2011) (summarily enforcing portions of order remedying unchallenged findings of the Board); *Advanced Stretchforming*, 233 F.3d at 1180 (same).

D. Boeing Violated Section 8(a)(1) of the Act by Maintaining the Revised Confidentiality Notice

The Board found that Boeing violated Section 8(a)(1) by maintaining the revised notice, which unlawfully "recommends" that employees refrain from discussing workplace investigations, without providing a legitimate and substantial business justification for encroaching upon their protected rights. The Board's finding is both reasonable and consistent with precedent. Where, as here, a case involves the balancing of workplace interests, "[i]t is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)); accord *Salt River*

Valley Water Users' Ass'n v. NLRB, 769 F.2d 639, 642 (9th Cir. 1985)

(“[B]alancing . . . conflicting legitimate interests . . . to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.” (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) (ellipses in *Salt River Valley*) (other citation omitted))).

Under established Board law, the determination of a rule’s legality is an objective one, which considers whether the rule possesses a “reasonable tendency . . . to coerce employees in the exercise of fundamental rights protected by the Act.” *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), *enforced*, 987 F.2d 1376 (8th Cir. 1993). Therefore, a rule’s “mandatory phrasing, subjective impact, or even evidence of [its] enforcement” are not dispositive. *Id.*; *accord Cintas*, 482 F.3d at 467-68. Instead, the focus of the analysis is on the text of the policy and the context in which it appears, and any ambiguity is construed against the employer. *Cintas*, 482 F.3d at 467, 469-70; *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). Finally, “[a]s long as its textual analysis is reasonably defensible, and adequately explained, the Board need not rely on evidence” that employees actually interpreted the rule to prohibit Section 7 activity. *Cintas*, 482 F.3d at 467 (quotation marks, brackets, and citation omitted); *accord Flex Frac*, 746 F.3d at 209.

1. Boeing's revised confidentiality notice infringes upon the Section 7 rights of employee witnesses who participate in workplace investigations

The Board found that Boeing's confidentiality notices are "virtually identical" and that, like the original, the revised notice interferes with employees' Section 7 right to discuss workplace investigations. (ER 3.) As noted above (pp. 18-19), Boeing does not dispute that the original notice was unlawful, but insists that the revised notice does not encroach on employee rights because it is styled as a recommendation instead of a requirement. The Board's finding is not only reasonable, but also supported by well-established precedent.

There are only two differences between the original and revised notices. First, Boeing rewrote "you are directed not to discuss this case" in the original notice as "we recommend that you refrain from discussing this case" in the revised version. Second, instead of saying, "please inform [coworkers] that you have been instructed not to discuss [the case]," the revised notice states, "we recommend that you inform [coworkers] that Human Resources has requested that you not discuss the case." (*Compare* ER 24 *with* ER 25; *see also supra* pp. 4-5, 7.) The Board reasonably found that those minor changes, particularly the substitution of "recommend" for "direct," did not "cure[]" whatever defects existed in the original notice." (ER 3.)

The Board has repeatedly emphasized that the determination whether a rule is unlawful “is not premised on mandatory phrasing,” but on the rule’s “reasonable tendency . . . to coerce employees” in the exercise of their Section 7 rights.

Radisson Plaza, 307 NLRB at 94. Thus, simply replacing an imperative with precatory language does not suffice to mitigate the notice’s coercive tendency.⁸

Furthermore, the term “recommend” is hardly as innocuous as Boeing claims. As the Board explained, the generally accepted definition of “recommend” is “to advise.” (ER 3-4 (citing *Merriam-Webster’s Collegiate Dictionary* (10th ed. 1999).) As such, it is not materially different from other terms, like “ask,” “shouldn’t,” or “request,” which the Board also found insufficient to redeem overbroad confidentiality policies. *See, e.g., Radisson Plaza*, 307 NLRB at 94 (finding rule unlawful, where it stated that salaries are “confidential, and *shouldn’t* be discussed with anyone other than” certain management personnel (emphasis added)); *Heck’s, Inc.*, 293 NLRB 1111, 1114, 1119 (1989) (finding that employer’s “*request* [that employees] regard [their] wages as confidential” was “a clear restraint” on their Section 7 rights (emphasis added)).

⁸ Boeing grudgingly concedes that, on its own, the recommendation “might conceivably be open to question whether it should be construed as a prohibition.” (Br. 20.) This concession dooms Boeing’s defense of the revised notice, since any ambiguity must be construed against Boeing as the promulgator of the notice. *See 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.”), *enforced*, 746 F.3d 205 (5th Cir. 2014); *Lafayette Park Hotel*, 326 NLRB at 828 (same).

Each in their own way, those terms convey the employer's desire for confidentiality, and for employees to assist in its maintenance. (ER 3.) For this reason, the Board has consistently held that "[i]t makes no difference whether . . . employees [a]re 'asked' not to discuss [their terms and conditions of employment] or ordered not to do so." *Cintas Corp.*, 344 NLRB 943, 946 (2005) (citation omitted), *enforced*, 482 F.3d 463 (D.C. Cir. 2007); *Franklin Iron & Metal Corp.*, 315 NLRB 819, 820 (1994), *enforced*, 83 F.3d 156 (6th Cir. 1996). In other words, an overbroad policy "is not salvaged by the fact that [it] merely 'asks,' or 'requests,'" confidentiality because a "request" that employees not discuss their terms and conditions of employment is itself a violation of Section 8(a)(1). *Koronis Parts, Inc.*, 324 NLRB 675, 694 (1997).

Boeing is either incredibly naïve or disingenuous when it claims that only employees with "some unorthodox understanding" of the term "recommendation" would fail to view the revised notice as "a suggestion, and not a requirement." (Br. 19.) The Supreme Court long ago recognized that the economic dependence inherent in employment relationships results in "the necessary tendency of [employees] . . . to pick up intended implications of [employers] that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *accord NLRB v. Marine World USA*, 611 F.2d 1274, 1277 (9th Cir. 1980). Boeing conveniently ignores that "obvious principle,"

Gissel, 395 U.S. at 617, just as it ignores the fact that it treats “recommend” as synonymous with “request” in its revised notice. (See ER 25 (“[W]e recommend that you inform [inquiring persons] that Human Resources has *requested* that you not discuss the case.” (emphasis added)).) All this supports the Board’s finding that employees would not reasonably construe a recommendation by their employer simply as a benign suggestion they are free to disregard.

The reasonableness of the Board’s determination is even more apparent when the revised notice is considered as a whole. Read in full, the notice clearly communicates that Boeing views maintaining confidentiality as an important task necessary to the success of its investigation, and that it greatly desires, or even expects, employees to help achieve that objective. By extension, the notice also conveys a strong sense that Boeing would not look favorably upon those who failed, or worse, chose not to maintain confidentiality. In addition, the fact that Boeing routinely requests employees to sign, date, and print their name on the notice imparts upon the process a formality that further underscores the importance Boeing accords to confidentiality and negates any advisory connotation its “recommendation” may have had.⁹ Indeed, there is nothing in the notice to even

⁹ Boeing’s explanation for having employees sign the revised notice, *i.e.*, to “show[] that the employee received and understood all the information” (Br. 22), does not withstand scrutiny. First, a signature does not evidence that the employee actually understood the information conveyed, and second, Boeing did not request

remotely suggest that employees are free to disregard Boeing's appeal.¹⁰ Thus, Boeing's desire for confidentiality, already expressed in the term "recommend," is only amplified by the notice as a whole. In this context, the Board's finding that "employees would not feel free to disregard [Boeing]'s recommendation" is entirely reasonable.¹¹ (ER 4.)

For one claiming that the Board's determination "defies common sense" (Br. 18, 23), Boeing's arguments are surprisingly detached from reality. Nowhere is that more apparent than when Boeing assumes that (Br. 20), as a matter of course, employees with no legal training apply the canons of statutory construction to parse and analyze their employment paperwork. Boeing offers no evidence to support that assertion but, in any event, the Board reads workplace rules from the

that employees sign the original notice (ER 2; ER 18 ¶ 11), yet it contained the same information as the revised version.

¹⁰ In finding that the revised notice lacked assurance that employees could safely disregard Boeing's confidentiality recommendation, the Board did not assume that the notice was unlawful on its own, as Boeing claims (Br. 22), but simply recognized that, without those assurances, reasonable employees would read the notice as restricting their Section 7 rights.

¹¹ There is absolutely no merit to NAM's claim (NBr. 4) that the Board has abandoned the reasonable-employee standard used to evaluate work rules under *Lutheran Heritage*, 343 NLRB at 646. As an initial matter, this Court generally declines to consider issues raised on appeal only by an amicus. *See United States v. Gementera*, 379 F.3d 596, 607 (9th Cir. 2004); *see also infra* p. 32 & note 16. In any event, the reasonable-employee standard is central to the inquiry in this case. Indeed, the Board's entire analysis focuses on how employees would reasonably construe Boeing's "recommendation," not only in the narrow context of the revised notice, but also considering the well-known idiosyncrasies and dynamics of employment relationships. (ER 3-4 & n.6.)

position of non-lawyer employees. *U-Haul Co. of Cal.*, 347 NLRB 375, 378 (2006), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007); *see also Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994) (“Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.”).

Equally confounding is Boeing’s claim that employees would reasonably understand that the notice’s advice to “refrain from discussing *this case*” (ER 25 (emphasis added)) does not extend to conversations protected by Section 7 because “nothing in the form say[s] that confidentiality should apply to those concerns.” (Br. 21.) In other words, Boeing asserts that reasonable employees would understand that “this case” is not shorthand for “any information related to this case,” but instead means, “any information related to this case except for information, the disclosure of which is conduct protected by Section 7 of the National Labor Relations Act.” Even if the first interpretation was not the most reasonable—which it clearly is—the Board has long held that “employees should not have to decide at their own peril what . . . is not lawfully subject to such a prohibition.”¹² *Hyundai*, 357 NLRB at 871; *accord, e.g., Quicken Loans, Inc. v.*

¹² As the Board has explained, “[t]his principle follows from the Act’s goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill

NLRB, No. 14-1231, ___ F.3d ___, 2016 WL 4056091, at *6 (D.C. Cir. July 29, 2016); *Flex Frac*, 358 NLRB at 1132; *NLRB v. Deutsch Co., Metal Components Div.*, 445 F.2d 902, 905 (9th Cir. 1971).

The rest of Boeing’s defense consists of plucking individual portions of the revised notice and arguing that, on their own, they could be read to support its view. However, when read in the context of the entire revised notice, the language excerpts on which Boeing relies actually support the Board’s determination.¹³ For instance, and contrary to Boeing’s argument (Br. 21-22), the sentence explaining the benefits of confidentiality does not alter the overall tenor of the notice, which is that Boeing finds confidentiality highly desirable and wants employees’ help maintaining it. In that context, reasonable employees would read the explanation merely as a justification for Boeing’s policy, not as a license to disregard it. Similarly, the fact that the notice creates a specific exception for employees to discuss investigations with union representatives (Br. 21) only reinforces the sense

is manifest, when the Board must undertake the difficult task of dispelling it.” *Flex Frac*, 358 NLRB at 1132; *see also NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011) (affirming that “the Board’s rule is intended to be prophylactic and . . . is subject to deference”).

¹³ This illustrates the reason why the Board guards against interpreting the meaning of a rule by “reading particular phrases in isolation.” *Lutheran Heritage*, 343 NLRB at 646.

that all other communications are off limits.¹⁴ And the provision about disclosing information on a “need to know basis” does nothing to alter that understanding. The first sentence of that paragraph explains to signatory employees how *Boeing’s investigators* will handle the information they provide, and that *investigators* “will not promise absolute confidentiality.” (ER 25.) In that context, employees would reasonably understand the second sentence as clarifying the circumstances under which their information may be divulged *by Boeing’s investigators*. It simply defies logic for Boeing to claim (Br. 20-21, 23) that employees would somehow read that sentence as an instruction on how *they* should share information acquired during the investigation.

Boeing also misfires in trying to distinguish *Heck’s* and *Radisson Plaza* by arguing that the rules in those cases were phrased in mandatory terms. (Br. 24-25.) Not only is that incorrect,¹⁵ it is also irrelevant. Indeed, the Board has made

¹⁴ Nor does permitting employees to speak with their union representatives render the policy lawful, as Boeing incorrectly suggests (Br. 26). *See Mobil Oil Expl. & Producing, U.S., Inc.*, 325 NLRB 176, 178 (1997) (finding confidentiality rule unlawful where investigator told employee “he should not discuss the investigation with anyone other than [his] union representative”), *enforced*, 200 F.3d 230 (5th Cir. 1999).

¹⁵ Boeing blatantly misrepresents *Heck’s* when it claims that the rule in that case contained “an unqualified directive not to discuss salaries.” (Br. 24 (stating that *Heck’s* rule “flat out said ‘do not discuss your salary[.]’”).) In fact, the rule said, “your company *requests* that you regard your wage as confidential and do not discuss your salary[.]” *Heck’s*, 293 NLRB at 1114 (emphasis added). In that sentence, “do not discuss your salary” is clearly a dependent clause, which is

clear—as it reiterated here—that “the determination whether a rule is unlawful ‘is not premised on mandatory phrasing.’” (ER 3 (quoting *Radisson Plaza*, 307 NLRB at 94).) The fact that *Heck’s* and *Radisson Plaza* involved the discussion of wages and salaries is equally without consequence. Section 8(a)(1) of the Act prohibits workplace rules that reasonably tend to interfere with employees’ right to discuss their terms and conditions of employment, regardless of their actual topic of conversation.

In sum, the Board reasonably found that Boeing’s “recommendation” that employees refrain from discussing information related to workplace investigations has the propensity to interfere with their Section 7 rights, whether read on its own or within the revised notice as a whole. Relying on decades of experience earned while administering the Act, the Board rightly found that, in the context of an employment relationship and for reasonable non-lawyer employees, replacing “you are directed” with “we recommend” is a distinction without a difference. In so

subordinate to, and qualified by, the operative verb “requests.” And in *Radisson Plaza*, the Board explained that the rule was unlawful *regardless* of its non-mandatory wording. 307 NLRB at 94 (“Your salary . . . *shouldn’t* be discussed with anyone” (emphasis added)). Boeing also misrepresents *Radisson Plaza* when it claims that a “TOP SECRET” graphic was “central to the Board’s decision in that case.” (Br. 25.) In fact, the Board made clear that, regardless of that graphic, it saw no distinction between “a rule that *requires* employees to keep their wages confidential and one that *advises* them that they *should not* discuss wages.” *Id.* at n.2.

finding, the Board saw Boeing's word substitution for what it is: a transparent end run around well-established Board law.

2. Boeing failed to preserve its otherwise meritless claim that the Board's Decision infringes upon Boeing's right to express an opinion under Section 8(c) of the Act

Before this Court, Boeing argues for the first time that the revised notice constitutes protected opinion under Section 8(c) of the Act, 29 U.S.C. § 158(c). (Br. 35-37; *see also* NBr. 7-8.) Because Boeing failed to raise that issue to the Board, either in its exceptions to the judge's recommended decision (SER 35-42) or in a motion for reconsideration, the Court has no jurisdiction to hear its belated claim.

Section 10(e) of the Act specifies that [n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Section 10(e) creates a jurisdictional bar, which precludes appellate courts from considering objections raised for the first time on appeal by a party that could have presented the issue to the Board but failed to do so. *See Int'l Union of Painter & Allied Trades, Dist. 15, Local 159 v. NLRB*, 656 F.3d 860, 867 (9th Cir. 2011) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)).

In this case, Boeing failed to raise its Section 8(c) argument in its exceptions to the judge’s recommended decision. (See SER 35-42.) Further, although Member Johnson raised the issue *sua sponte* in his dissent (ER 6-7)—and the Board majority rejected his argument (ER 4)—Boeing still failed to preserve the issue because it did not move the Board to reconsider its Decision on that basis. See *Woelke & Romero*, 456 U.S. at 665-66 (holding that Section 10(e) applies even when Board addresses issues *sua sponte*); *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016) (“[A] party may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the [Board] majority to overcome the [Section] 10(e) bar; the Act requires the party to raise its challenges itself.”). Accordingly, the Court lacks jurisdiction to hear that argument.¹⁶

In any event, Boeing’s argument misses the mark. Section 8(c) provides that an employer may express opinions to employees “so long as [those opinions] do not contain a ‘threat of reprisal or force or promise of benefit.’” *Gissel*, 395 U.S.

¹⁶ Generally, this Court “do[es] not consider on appeal an issue raised only by an amicus.” *Gementera*, 379 F.3d at 607 (quoting *Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir.1993)). The Court has made exceptions to that rule, notably when parties express the intent to adopt amici’s arguments as their own. See *id.* However, as explained above, Section 10(e) operates as a jurisdictional bar to prevent courts from considering arguments that were not first raised to the Board. Therefore, Boeing should not be allowed to adopt NAM’s argument as its own after failing to preserve it below, as that would nullify Section 10(e)’s “salutary policy . . . of affording the Board [the] opportunity to consider on the merits questions to be urged upon review of its order.” *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1329 (D.C. Cir. 2012) (ellipsis and brackets in original) (quotation marks and citation omitted).

at 618 (quoting 29 U.S.C. § 158(c)); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. NLRB*, 834 F.2d 816, 820 (9th Cir. 1987). To the extent that Boeing suggests the entire revised notice is a statement of opinion (Br. 35), it ignores the Board's reasonable finding that "employee[s] could reasonably construe the [notice] as carrying the potential for retaliation that would not exist in other relationships." (ER 4 n.6.) And while the revised notice's statement that discussing an investigation "could impede the investigation and/or divulge confidential information to other employees" (ER 25) could arguably be protected opinion on its own, in the context of the revised notice, that statement falls outside of the ambit of Section 8(c).

3. Boeing failed to present a legitimate and substantial business justification that would outweigh its employees' interest in exercising their Section 7 rights

The Board found that all employees who participate in HR investigations are asked to sign copies of the revised notice, without any prior review to determine whether confidentiality is truly necessary in a particular case. (ER 3-4, 10.)

Boeing does not dispute that finding; indeed, Boeing argues (Br. 27-35) that it is entitled to maintain a blanket confidentiality policy and forego individualized assessments altogether. Given that position, Boeing necessarily fails to meet its burden of establishing a legitimate and substantial business justification for the revised confidentiality notice under applicable Board law. *See Banner*, 2015 WL

4179691, at *5 (“[T]he employer must proceed on a case-by-case basis” to establish the business justification for its confidentiality policy); *see also Hyundai*, 357 NLRB at 874. Accordingly, the Board reasonably concluded that the revised notice impermissibly infringes on employees’ Section 7 rights because Boeing failed to conduct an individualized review of whether “corruption of its investigation would likely occur without confidentiality.” (ER 4 (quoting *Hyundai*, 357 NLRB at 874).)

Boeing argues that it should not be required to make individualized confidentiality determinations because it has an overarching legitimate and substantial business justification for maintaining its blanket policy. However, Boeing completely failed to raise that argument in its exceptions to the Board. (See SER 35-42.) Nowhere do those exceptions even mention the judge’s finding that he was bound by the Board’s decision in *Hyundai*, or his consequent refusal to consider the broad business justification that Boeing asserts on review. (ER 9-10.) Accordingly, and as explained above (pp. 31-32), the Court lacks jurisdiction to hear those claims.

Nor does it suffice that Boeing’s brief in support of exceptions contains passing references to some of its appellate arguments. (See SER 51-53.)¹⁷ Board

¹⁷ Although, as explained below, Boeing’s brief in support of exceptions is not part of the record of this case, it is included in the Board’s Supplemental Excerpts

regulations provide, and courts have recognized, that the “record” in a Board case does not include supporting briefs. *See* 29 C.F.R. § 102.45(b); *United Parcel Serv., Inc. v. NLRB*, 706 F.2d 972, 979 n.16 (3d Cir. 1983) (brief in support of exceptions is not part of record on appeal), *judgment vacated on other grounds*, 464 U.S. 979 (1984); *A.H. Belo Corp. v. NLRB*, 411 F.2d 959, 967 (5th Cir. 1969) (same), *cert. denied*, 396 U.S. 1007 (1970). Further, the Board’s regulations unambiguously command parties to “set forth specifically [in their exception] the questions . . . to which exception is taken,” and “concisely state the grounds for [each] exception.” 29 C.F.R. § 102.46(b)(1)(i), (iv). Those rules also provide that “the Board may disregard or consider waived any exceptions failing to conform to these requirements.” *NLRB v. Sw. Sec. Equip. Corp.*, 736 F.2d 1332, 1335 (9th Cir. 1984) (citing 29 C.F.R. § 102.46(b)(2)). Indeed, the rules squarely state that a “brief in support of exceptions shall contain no matter not included within the scope of the exceptions.” 29 C.F.R. § 102.46(c).

Moreover, even if the supporting brief is taken into consideration, Boeing still falls short of having preserved its business-justification argument. While some courts will examine exceptions briefs to clarify the nature of an objection, they still require the objection to be at least vaguely stated in the exceptions themselves. *See, e.g., DHL Express, Inc. v. NLRB*, 813 F.3d 365, 372 (D.C. Cir.

of Record for the Court’s convenience (*see* SER 43-68), and in anticipation of Boeing’s response to the Board’s argument.

2016) (“vague exception to an ALJ’s finding may be sufficient to preserve an issue for appeal” if supporting brief provides sufficient elaboration (quotation marks and citation omitted)). As noted above, however, Boeing’s exceptions do not even allude to its belatedly raised affirmative defense. Thus, Boeing failed to adequately preserve its business-justification argument.¹⁸

In any event, the Court should reject Boeing’s business-justification argument that blanket confidentiality policies are necessary to address confidentiality interests that may arise during particular investigations. Boeing insinuates that the Board does not accord those interests sufficient weight (Br. 28-29), but that is simply not true. To be sure, the Board recognizes that employers have a “legitimate need for confidentiality in certain circumstances to protect the integrity of their workplace investigations.” *Banner*, 2015 WL 4179691, at *5. However, Boeing’s singular focus on the interests of employers—which NAM

¹⁸ *Compare Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1090 (D.C. Cir. 2016) (holding that objection was “just barely” preserved because it was “vague[ly]” mentioned in exceptions and employer’s supporting brief, while “no paragon of precision or detail,” contained “several statements adequate to apprise the Board that the [employer] intended to press” the issue (other quotation marks and citations omitted)), *with DHL Express*, 813 F.3d at 372 (holding that employer forfeited issue where there was “neither a clear statement [of that issue] in [the employer’s] exceptions nor a less-than-clear statement that [wa]s fully explained in the [supporting] brief.”); *see also Local 512, Warehouse & Office Workers’ Union v. NLRB*, 795 F.2d 705, 714 (9th Cir. 1986) (holding that generalized exception, combined with discussion in supporting brief, preserved employer’s objection to backpay remedy), *abrogated on other grounds by Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

shares—ignores the countervailing interests of employees.¹⁹ As noted above (pp. 20-21), it is the Board’s statutory responsibility to craft policies that accommodate *both* parties’ interests. The Board’s individualized approach serves that purpose by giving employers the flexibility to request confidentiality when their interests truly require it, while preserving employees’ Section 7 rights the rest of the time. For example, if an employer shows, based on objectively reasonable grounds, that the circumstances of a particular investigation present a risk of not receiving accurate information, or a threat of retaliation, a request for confidentiality could be justified. Indeed, in *Caesar’s Palace*, 336 NLRB at 272, the Board found that the nature of the investigation—which involved allegations of management cover-up, possible management retaliation, and threats of violence—

¹⁹ Boeing (Br. 29) and NAM (NBr. 9-10) are both misguided in their reliance on the Board’s decisions in *IBM Corp.*, 341 NLRB 1288 (2004), and *Belle of Sioux City, L.P.*, 333 NLRB 98 (2001). *IBM* did not consider whether employers could indiscriminately request confidentiality about investigations, but whether nonunion employees were entitled to have a coworker present during investigatory interviews that could lead to discipline. 341 NLRB at 1288. Therefore, the Board was not weighing the benefits of confidentiality against the Section 7 rights of employees. *Id.* at 1292-93. And in *Belle of Sioux City*, the employer that requested confidentiality had specific reasons to suspect that rumors would spread and evidence that the manager under investigation could be angry and vindictive when confronted. 333 NLRB at 101-02. Finally, *Charles Schwab & Co., Inc.*, No. 28-CA-19445, 2004 WL 3023761 (Dec. 16, 2004), on which NAM relies (NBr. 10 n.3), is an administrative-law-judge decision that was not reviewed by the Board, and therefore “has no precedential value.” *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003).

justified the employer's imposition of a confidentiality rule to protect witnesses, preserve evidence, and reduce the risk of perjury.²⁰

Boeing also enumerates various confidentiality interests, and argues that they are legitimate and should therefore suffice to justify its policy. (Br. 28-31.) But simply identifying potential interests at stake does not end the analysis. The employer must also show that, in a given case, the benefits of confidentiality—improving the effectiveness of the investigation, for example—outweigh the policy's chilling effect on employees' right to discuss their terms and conditions of employment. *Inova Health*, 795 F.3d at 85; *Hyundai*, 805 F.3d at 314; *Banner*, 2015 WL 4179691, at *3; *Caesar's Palace*, 336 NLRB at 272 & n.6. The fact that Boeing's policy does not include such an individualized analysis leaves no room for employees' countervailing interest in exercising their Section 7 rights.

Therefore, it comes as no surprise that Boeing's policy is not tailored to the confidentiality interests that the policy allegedly serves. For instance, Boeing

²⁰ Boeing's paean for blanket confidentiality policies (Br. 29-31) also ignores the chilling effect that they can have on Section 7 activity. *See Banner*, 2015 WL 4179691, at *8 & n.16. The Board's framework minimizes that impact by making clear the nature and scope of the employer's request, thus reducing the risk that employees will reasonably interpret a particular request as prohibiting protected conduct. As the Board noted in *Banner*, if "an employer establishes an objectively reasonable basis for seeking confidentiality during a particular investigation, employees will better understand not only why nondisclosure is being requested, but also what matters are and are not appropriate for conversation." *Id.* at *8. Therefore, unlike the blanket policy advocated by Boeing, the Board's tailored approach limits the risk of overbroad confidentiality requests chilling employees in the exercise of their Section 7 rights.

argues that confidentiality is necessary to ensure the integrity of investigations and prevent witnesses from coordinating testimonies. (Br. 29-30.) But the revised notice recommends against discussing the case “with *any* Boeing employee.” (ER 25 (emphasis added).) Discouraging witnesses from talking to non-witnesses does little to ensure the integrity of their testimony.²¹ Similarly, Boeing argues (Br. 28-29, 30) that confidentiality is necessary to protect “witnesses, victims, or accused employees” against possible retaliation, but the revised notice already fulfills that purpose because it contains an express warning that Boeing “prohibits retaliation against any individual who makes a complaint or participates in an investigation.”

²¹ As such, Boeing’s policy is broader than the Board’s sequestration rule, which prevents witnesses in court or Board proceedings from hearing the testimony of other witnesses. *See Greyhound Lines, Inc.*, 319 NLRB 554, 554 (1995); *see also* Fed. R. Evid. 615 (federal sequestration rule); 29 C.F.R. § 102.39 (regulation providing that Board proceedings are conducted in accordance with the Federal Rules of Evidence “so far as is practicable”). Therefore, Boeing’s attempt to analogize the two fails. (Br. 29-30 & n.2.) Moreover, whereas the Board’s rule does not apply to parties, *Greyhound Lines*, 319 NLRB at 554; *see also* Fed. R. Evid. 615, Boeing’s policy extends to complainants. Indeed, it was Gamble who lodged the complaint that led to her discipline. (ER 19 ¶ 18, SER 11-12.)

The analogy that Boeing and NAM attempt to draw between the revised notice and the Board’s confidentiality policy for witness affidavits (Br. 29, NBr. 13-14) is similarly false. First, there is no employment relationship between the Board and witnesses who participate in its investigations. Second, the Board’s confidentiality rule covers only the affidavits themselves, which are considered confidential law enforcement records. Finally, Board agents do not request that witnesses refrain from discussing the investigation itself, or even the interview. *See NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings* §§ 10060.5, 10060.9 (Feb. 2016), <https://www.nlr.gov/reports-guidance/manuals> (follow “NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings (February 2016)” hyperlink) (last visited Sept. 21, 2016).

(ER 25.) Boeing’s interest in shielding employees against retaliation is therefore adequately served without also requiring them to sign a notice promising not to discuss the case with coworkers.²²

There is no merit to Boeing’s claim (Br. 31-32; *see also* NBr. 10-11) that its confidentiality policy is necessary to comply with other statutes governing the workplace. As an initial point, the Board recognizes that compliance with other laws can be a legitimate business justification for requesting confidentiality. *See Banner*, 2015 WL 4179691, at *6 n.12. However, Boeing has presented no evidence that its confidentiality policy stemmed from an interest in complying with another statutory mandate. Nor is Boeing’s policy tailored to serve such an interest. For instance, Boeing stresses its obligation under Title VII to investigate harassment claims (Br. 31), but fails to recognize that the effect of its policy is to “silence sexual harassment witnesses and victims.” *Phoenix Transit*, 63 F. App’x at 525 (enforcing Board order finding that employer’s justification for confidentiality rule—the success of its sexual-harassment policy depended on it—lacked evidentiary support and did not outweigh employees’ Section 7 rights).

²² Boeing’s asserted interest (Br. 26, 29) in preventing gossip and rumor-mongering is equally overbroad. Indeed, the Board has repeatedly found rules prohibiting “false, vicious, profane, or malicious statements” to be unlawful because, absent more specificity, they have a reasonable tendency to chill protected conduct. *See, e.g., Lafayette Park Hotel*, 326 NLRB at 828 (citing cases); *see also Laurus Tech. Inst.*, 360 NLRB No. 133, 2014 WL 2705207, at *1, 11-13 (June 13, 2014) (adopting, in the absence of exceptions, judge’s finding that no-gossip policy was unlawfully overbroad) (citing cases).

Further, few of the “myriad” other laws (NBr. 10) that Boeing and NAM allege conflict with the Board’s decision actually address confidential investigations. For example, the Americans with Disabilities Act (“ADA”) and the Family and Medical Leave Act (“FMLA”) mandate confidentiality of employee medical information, not workplace investigations. *See* 42 U.S.C. § 12112(d)(3)(B), (d)(4)(C) (ADA); 29 C.F.R. § 825.500(g) (FMLA). And none of the cited authority, which deals with an *employer’s* obligation, on its face requires the broad limit on *employee* activity that Boeing and NAM propose.²³

Boeing’s further claim (Br. 33-34; *see also* NBr. 5-7) that an individualized confidentiality determination would be “impractical” for employers should be rejected because it is not properly before the Court and lacks merit. Boeing’s exceptions do not mention any business justification whatsoever, let alone this one, and its brief in support of exceptions is completely silent on this point as well.²⁴ *See supra* pp. 31-32. In any event, Boeing’s position is inconsistent with precedent, as courts and the Board have long held that the burden of justifying a

²³ For example, the Equal Employment Opportunity Commission (“EEOC”) document quoted by Boeing (Br. 31; *see also* NBr. 12-13) is guidance specifically intended for *employers* about best practices to avoid liability and limit damages resulting from unlawful supervisor harassment. *See* EEOC, Notice No. 915.002, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (1999), <https://www.eeoc.gov//policy/docs/harassment.html> (last visited Sept. 21, 2016).

²⁴ Moreover, NAM is not free to make arguments that Boeing failed to preserve below. *See supra* note 16.

restraint on Section 7 rights is on the employer. *Hyundai*, 805 F.3d at 314; *Caesar's Palace*, 336 NLRB at 272 & n.6. And, for reasons explained above, (p. 15 n.4), Boeing is best positioned to assess the need for confidentiality in a given case.

Equally unfounded—and unpreserved—is Boeing's newly minted claim that the *Hyundai* standard “trenches upon” other federal statutes or policies. (Br. 33 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).) Again, the *Hyundai* standard does not prevent employers from complying with other statutory requirements; it simply ensures that, in doing so, employers do not unnecessarily interfere with their employees' section 7 rights. That is a far cry from *Hoffman Plastics*, where the Supreme Court found that the Board's remedy “not only trivialize[d] the immigration laws, [but] also condone[d] and encourage[d] future violations.” 535 U.S. at 150. Despite its alarmist rhetoric, Boeing does not, and cannot, put forth any evidence that the *Hyundai* standard “runs counter” to, let alone “subverts,” any other state or federal law. *Id.* at 149-50.

Finally, there is no merit to Boeing's assertion that the *Hyundai* standard “diminish[es] confidentiality” and will have all sorts of nefarious consequences, such as “more compromised investigations, [and] more retaliation.” (Br. 33.) Indeed, neither *Hyundai*, *Banner*, nor the Board's Decision in this case preclude

employers from imposing strict confidentiality rules—and enforcing them—so long as they are based on objectively reasonable grounds and narrowly tailored to the needs of individual investigations. Boeing’s claim actually exposes the fallacy of its argument that its confidentiality policy is merely “a recommendation [that] is permissive in nature.” (Br. 19.) On one hand, Boeing insists that only employees with “some unorthodox understanding” of the term “recommendation” would not understand that they are free to disregard the revised notice. (Br. 19.) But on the other, Boeing maintains that its policy, advisory as it may be, better serves its confidentiality interests than a *Hyundai*-like rule that can actually be enforced.²⁵ Boeing cannot have it both ways.

In sum, the *Hyundai* standard offers employers the flexibility to preserve their confidentiality interests, while at the same time protecting employees’ Section 7 rights—contrary to Boeing’s one-size-fits-all approach. In so doing, *Hyundai* “strikes the proper balance between [the competing interests of employer and employees] in light of the Act and its policy.” *Fleetwood Trailer*, 389 U.S. at 378 (quotation marks omitted). Boeing does not dispute that its blanket policy fails to evaluate, on an individualized basis, whether and how much confidentiality

²⁵ Boeing is so adamant about the voluntary nature of its policy that it even suggests it has no idea “how[] one would ‘violate’ a recommendation.” (Br. 34.) If Boeing is consistent, then it must also concede the obvious corollary, which is that there is no way to enforce a recommendation either—and that its policy is therefore purely symbolic.

is necessary to preserve the integrity of its investigations, or that this failure comes at the expense of its employees' protected rights. Boeing also fails to show that its policy is narrowly tailored to the various confidentiality interests that the policy is supposedly designed to protect. Therefore, the Board reasonably found that Boeing failed to assert a legitimate and substantial business justification for restricting employees' right to discuss information related to workplace investigations.

II. The Board Acted Within its Broad Remedial Discretion in Devising the Notice-Posting Remedies for Boeing's Violations

In Section 10(c) of the Act, Congress conferred upon the Board the power to remedy unfair labor practices by ordering any entity found violating the Act to "take such affirmative action . . . as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). The Board's remedial power under Section 10(c) is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (citation omitted); *E. Bay Auto. Council v. NLRB*, 483 F.3d 628, 632 (9th Cir. 2007). "In fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *Gissel*, 395 U.S. at 612 n.32; *see also Fibreboard Paper*, 379 U.S. at 216 ("[T]he relation of remedy to policy is peculiarly a matter for administrative competence" (citation omitted)). Accordingly, courts may not overturn the Board's remedial orders

except in cases of “clear abuse of discretion.” *Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 308 (9th Cir. 1996) (citation omitted). Such abuse occurs only if “it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Fibreboard Paper*, 379 U.S. at 216 (citation omitted); *E. Bay Auto. Council*, 483 F.3d at 632.

The Board ordered Boeing to post a nationwide remedial notice about the unlawful confidentiality notices (ER 14 App. B), and a separate notice at the Renton facility that also addresses Gamble’s unlawful discipline (ER 13 App. A). Boeing opposes both postings (Br. 38-41), but its challenge to the Board’s remedy is no more availing than its arguments on the merits.

A. The Board did not abuse its discretion by requiring a nationwide posting regarding Boeing’s unlawful notices

It is undisputed that Boeing used the original notice, and continues to use the revised notice, at most of its facilities around the country. (ER 2-3, 12; ER 18 ¶¶ 11-12.) When an employer maintains an overbroad rule as a companywide policy, the Board’s remedy is to “order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.”

Guardsmark, LLC, 344 NLRB 809, 812 (2005) (footnote and citation omitted), *enforced in relevant part*, 475 F.3d 369, 380-81 (D.C. Cir. 2007). Because maintenance of the rule itself is an unfair labor practice, *Cintas*, 482 F.3d at 467-68, the scope of the posting is commensurate with the violation. *See Albertson’s*,

Inc., 300 NLRB 1013, 1013 n.2 (1990) (“[W]e deem it appropriate as a remedial measure to require that posting of the notice be coextensive with the Respondent’s application of its [unlawful rule.]”), *enforcement denied on other grounds*, 17 F.3d 395 (9th Cir. 1994) (Table).²⁶

The Board acted within its discretion by ordering a nationwide remedial posting regarding the unlawful confidentiality notices. Boeing committed an unfair labor practice wherever it maintained the unlawful notices, even if they were not enforced. *Cintas Corp.*, 482 F.3d at 467-68. Therefore, a multi-facility posting commensurate with the scope of Boeing’s maintenance is entirely reasonable. Moreover, courts have consistently enforced such orders, agreeing with the Board that “only a company-wide remedy extending as far as the company-wide violation can remedy the damage” caused by an unlawful policy. *Guardsmark*, 475 F.3d at 380-81 (holding that “[n]ationwide remedial notice . . . effectuate[s] the policies of the [Act]” where employer distributed handbook containing unlawful rules to all employees nationwide (quotation marks omitted)); *see also Fresh & Easy Neighborhood Mkt.*, 468 F. App’x at 3 (same).

²⁶ In *Guardsmark*, the Board specified that “an employer may avoid imposition of a companywide remedy by showing that ‘special circumstances’ justify a narrower remedy.” 344 NLRB at 812 n.9 (citation omitted). Boeing never asserted any special circumstances to the Board, and does not raise any before this Court. Should Boeing do so now, the Court would be jurisdictionally barred from hearing such a claim. *See supra* p. 31.

Contrary to Boeing's claim (Br. 38-39), "hallmark" violations are not necessary to trigger multi-facility relief in cases involving a widely disseminated work rule. The error in Boeing's argument is easily discerned by comparing this case with *Torrington Extend-A-Care Employee Association v. NLRB*, 17 F.3d 580 (2d Cir. 1994), on which Boeing mistakenly relies. *Torrington* involved various unfair labor practices that had been committed in some, but not all, of the employer's facilities, and were not the result of a "corporate-wide labor policy." *Id.* at 586. Thus, the question was whether the facts of the case supported a nationwide remedy, either based on "an inference that the employer [would] commit further unlawful acts" at other sites, or because "employees at other sites [were] aware of the unfair labor practices and may be deterred by them from engaging in protected activities." *Id.* at 585. By contrast, this case involves an unlawful confidentiality policy that is already applied companywide, and for which "mere maintenance" violates the Act. *Cintas*, 482 F.3d at 467-68. Therefore, because maintaining the policy is an *existing* violation wherever it is in place, no inference about the likelihood of *future* violations is needed to justify a nationwide remedy.

Nor is there any substance to Boeing's claim that a nationwide posting remedy is not appropriate when an unlawful policy is not "widely distributed or publicized." (Br. 39.) The Board has found nationwide postings appropriate in

cases where an unlawful policy is disseminated to employees on an *ad hoc* basis. This case does not differ materially from *United States Postal Service*, where the Board found that the employer's investigators applied an unlawful companywide policy contained in their manual, but not otherwise distributed to employees. 303 NLRB 463, 464, 470-71 (1991). The Board ordered a nationwide posting, finding that "the need for remedial action that will reach all the employees . . . [wa]s not lessened by the fact that" only one violation occurred at one facility because "the potential for similar violations to occur" continued to exist as long as the policy remained in effect nationwide. *Id.* at 463 n.5. The D.C. Circuit enforced the Board's remedy, holding that "in view of the [employer's] nationwide policy . . . , the Board acted within its large remedial discretion in requiring the posting of [companywide] corrective notices." *U.S. Postal Serv. v. NLRB*, 969 F.2d 1064, 1072-73 (D.C. Cir. 1992) (Ginsburg, J.); *see also, e.g., Schwans Home Serv., Inc.*, 364 NLRB No. 20, 2016 WL 3227714, at *10-12 (June 10, 2016) (ordering nationwide notice posting regarding unlawful language contained in suspension notices issued to individual employees nationwide), *pet. for review filed*, No. 16-1251 (D.C. Cir. July 25, 2016); *Banner*, 2015 WL 4179691, at *1 n.3, *2 (ordering corporate-wide posting where only participants in HR investigations were notified of confidentiality rule).

Moreover, this case is a prime example of how the logistics of effectuating a notice-posting remedy favor a nationwide solution. Indeed, the Board reasonably found that, given the number of people implicated by this ruling, a nationwide posting is likely to be substantially less burdensome for all involved than identifying and separately notifying each employee who was ever issued a notice. (ER 12-13.) Boeing does not dispute that finding, much less demonstrate how the Board's remedy is "a patent attempt to achieve ends other" than furthering the Act's policies. The only alternative Boeing proposes is to eliminate the posting altogether; but however attractive that outcome may be for Boeing, it would not satisfy the Board's responsibility to "act in the public interest to enforce public rights" guaranteed by the Act. *Airport Parking Mgmt. v. NLRB*, 720 F.2d 610, 615 (9th Cir. 1983) (citing *National Licorice Co. v. NLRB*, 309 U.S. 350, 364-65 (1940)).

B. The Board did not abuse its discretion by requiring a remedial notice regarding Gamble's unlawful discipline

Boeing also fails to show that the Board abused its discretion in requiring a notice posting at Boeing's Renton facility with regard to Gamble's unlawful discipline. As this Court has long recognized, the Board's remedial authority includes "the power to require that the offending party post a remedial notice that conveys to the employees a guarantee that their rights under the Act will be respected in the future." *NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375, 1380 (9th

Cir. 1987) (citing *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940)). That exercise does not require showing that other employees are aware of the violation in question, as Boeing suggests. (Br. 41.) The notice ordered by the Board fulfills that purpose, and thus it is not “a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Fibreboard Paper*, 379 U.S. at 216 (citation omitted).

Boeing seems to argue that rescinding and repudiating Gamble’s written warning is sufficient to satisfy the spirit, if not the letter, of the Board’s Order, and thus renders the notice unnecessary.²⁷ But the notice-posting requirement is a separate part of the Board’s Order, and Boeing’s actions have no bearing on, and are certainly no substitute for, its legitimate purpose of informing other employees about their employer’s violation and assuring them that it will not happen again. Therefore, Boeing fails to show that the Board clearly abused its discretion, *Cal. Pac. Med. Ctr.*, 87 F.3d at 308, by ordering the notice posting.

²⁷ The Board seeks enforcement of its Order in full, and expresses no opinion as to whether Boeing has complied with paragraph 2(b), which requires it to rescind Gamble’s written warning and “advise her in writing that this has been done and that the warning will not be used against her in any way.” (ER 13.) Boeing will be able to show that it has complied with paragraph 2(b) during the compliance stage of this proceeding. *See, e.g., Chevron Mining*, 684 F.3d at 1330 (“‘[C]ompliance proceedings provide the appropriate forum’ to consider objections to the relief ordered.” (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984))).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Boeing's petition for review and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Board Counsel is unaware of any case pending in this Court related to this case within the meaning of 9th Cir. R. 28-2.6.

Respectfully submitted,

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September 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOEING COMPANY,)	
)	
Petitioner/Cross-Respondent)	Nos. 15-72894
)	15-73101
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD,)	19-CA-089374
)	
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 12,746 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

s/ Linda Dreeben
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Dated at Washington, DC
this 21st day of September 2016

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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides in relevant part:

. . . No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.39 *Rules of evidence controlling so far as practicable.*

Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, (title 28 U.S.C., secs. 723-B, 723-C).

29 C.F.R. § 102.45(b) *Administrative law judge's decision; contents; service; transfer of case to the Board; contents of record in case*

The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46, shall constitute the record in the case.

29 C.F.R. § 102.46 *Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.*

(a)

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in section 102.46(j).

(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

.....

THE BOARD'S CASEHANDLING MANUAL, PART ONE UNFAIR LABOR PRACTICE PROCEEDINGS

10060.5 Assurances of Confidentiality

At the beginning of the interview, the Board agents should give the following confidentiality assurance, which should also be incorporated in the affidavit:

I have been given assurances by an agent of the National Labor Relations Board that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the Board and will not be disclosed unless it becomes necessary to produce the Confidential Witness Affidavit in connection with a formal proceeding.

An affidavit may be disclosed pursuant to Sec. 102.118(b), Rules and Regulations (Jencks Act) after a witness has testified in a Board proceeding and in some instances the affidavit may become public without the necessity of proceeding to a formal hearing (e.g., where the affidavits are attached to a petition for injunctive relief or where they are attached to a Motion for Summary Judgment). Where the witness has particular concerns about the consequences of providing an affidavit, the Board agent should explain that the Act proscribes retaliation against witnesses by either employers or labor organizations. Where the witness expresses a willingness to testify truthfully but wishes to avoid the appearance of favoring one side, the Regional Office should consider issuance of an investigative subpoena.

Board agents should not tell a witness that it will never be necessary to testify or that the Agency could provide "protection" under all circumstances.

10060.9 Copies of Affidavits

Immediately at the conclusion of the affidavit session, or as soon thereafter as practicable, the Board agent should:

- Give a copy of the signed affidavit to the witness and obtain written acknowledgement of receipt
- Advise the witness that the affidavit is being provided so that he/she can further review it and advise the Region of any inaccuracies or omissions

- In order to enhance the confidentiality of the affidavit, instruct the witness not to share the affidavit with anyone other than his/her attorney or designated representative (i.e., one who is entitled under the General Counsel’s policy to be present during the affidavit interview (Sec. 10058) whether or not such person was actually present during the interview)
- Except as set forth below, prior to the hearing, copies of affidavits should not be given to persons other than the respective affiants. For production of affidavits during the hearing, see Sec. 10394.7. Copies of affidavits may be provided to counsel or other representative in the following circumstances:
 - When a party to the case is represented by counsel or other representative and a witness who is an agent of such party, or the counsel or other representative, makes a written request to provide a copy of the affidavit to their counsel or representative
 - When a witness who is not a supervisor or an agent of any party provides a written designation of counsel or other representative and the witness or counsel or other representative makes a written request that a copy of the witness’ affidavit be provided to that counsel or representative.

When an unrepresented affiant requests that a copy of his/her affidavit be provided to a counsel or other representative who also represents a party to the case, that request will not be honored.

THE AMERICANS WITH DISABILITIES ACT

42 U.S.C. § 12112. Discrimination

(d) Medical examinations and inquiries

[. . .]

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

- (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
 - (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
 - (iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and
- (C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) [. . .]

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

THE FAMILY AND MEDICAL LEAVE ACT (Rules and Regulations)

29 C.F.R. § 825.500. Recordkeeping Requirements

(g) Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (see 29 CFR 1635.9), which permit such information to be disclosed consistent with the requirements of

FMLA. If the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 CFR 1630.14(c)(1)), except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

THE FEDERAL RULES OF EVIDENCE

Rule 615. *Excluding Witnesses*

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d) a person authorized by statute to be present.

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)	
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)	

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2016, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 21st day of September 2016