

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.**

**VERITAS HEALTH SERVICES, INC. d/b/a  
CHINO VALLEY MEDICAL CENTER,**

**Respondent,**

**and**

**UNITED NURSES ASSOCIATIONS OF  
CALIFORNIA/UNION OF HEALTH CARE  
PROFESSIONALS, NUHHCE, AFSCME,  
AFL-CIO,**

**Charging Party.**

**Case Nos. 31-CA-029713, et al.  
(362 NLRB No. 32)**

**RESPONDENT'S STATEMENT OF  
POSITION IN RESPONSE TO REMAND  
FROM NINTH CIRCUIT COURT OF  
APPEALS**

**I.**

**INTRODUCTION AND SUMMARY OF ARGUMENT**

During unfair labor practice proceedings before the Board, the Charging Party Union (“Union”) asserted that the ALJ and the Board should have found that Respondent committed a separate unfair labor practice by maintaining a rule in its employee handbook restricting employee statements to the media, even though the General Counsel did not allege that maintenance of the rule violated the Act. The rule included in the handbook provided

The Facility draws a lot of attention from the media. Only the designated spokespersons may make statements to the members of the media on behalf of the Facility, its patients, or its employees. If you are approached by members of the media, refer them to Administration for assistance.

The Ninth Circuit’s remand requests that the Board consider whether it should grant the Union’s request that Respondent be ordered to rescind the rule. *United Nurses Ass’ns of Cal. v. NLRB*, 871 F.3d 767, 790 (9th Cir. 2017) (“Ninth Circuit Decision”).

Respondent contends that it is unnecessary for the Board to modify its prior order to include a provision requiring Respondent to rescind the rule. First, the rule as reasonably interpreted does not prohibit or interfere with Section 7 activity. *The Boeing Company*, 365 NLRB No. 154, slip op. at 3 (2017) (“*Boeing*”). Second, the rule is not unlawful because the potential for an adverse impact on Section 7 rights due to the maintenance of the rule is outweighed by legitimate justifications for the rule. *Id.*, slip op. at 3-4, 15-16; *Flagstaff Medical Center*, 357 NLRB 659, 663 (2011); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Third, requiring that the rule be rescinded is unnecessary because the Board’s order already prohibits Respondent from “broadly prohibiting employees from speaking to the media, including about the Union or about terms and conditions of employment” and includes similar language in the Notice to Employees. Fourth, subsequent to the Board’s order but prior to the Ninth Circuit’s decision, Respondent modified the rule to include the statement “This Policy should not be interpreted to prohibit employees from discussing the terms and conditions of their employment in violation of Section 7 of the National Labor Relations Act.” In sum, the purposes of the Act will best be effectuated by a Board determination that further proceedings on the rule are not necessary or otherwise warranted.

## **II.** **STATEMENT OF THE CASE**

General Counsel’s complaint alleged that Respondent violated Section 8(a)(5) by unilaterally modifying its policies concerning attendance at mandatory meetings, tardiness and payment of part-time RNs for attendance at certification classes. GCX 1(ww) ¶¶ 10-11, 13.<sup>1</sup> During the course of the June-July 2011 hearing before the ALJ, Respondent introduced its then-

---

<sup>1</sup> “GCX” shall refer to General Counsel’s exhibits admitted during proceedings before the ALJ, “RX” shall refer to Respondent’s exhibits, “UX” shall refer to the Union’s exhibits, and “T” shall refer to the transcript from the hearing.

current employee handbook into evidence to support its contentions that it had not modified those policies. See, e.g., T 997-1000; Respondent’s Post-Hearing Brief, pp. 4, 12, 15.

In its post-hearing brief to the ALJ, the Union argued the ALJ should find that Respondent violated Section 8(a)(1) by maintaining the “media rule” quoted above in its handbook, even though General Counsel had not alleged Respondent violated the Act by publishing a handbook including the rule. See, e.g., Charging Party’s Post-Hearing Brief, pp. 1, 15, 30-32. The ALJ refused to do so, noting that General Counsel had not challenged the rule in his complaint or his post-hearing brief and “[t]he bare minimum of due process requires that a respondent know ahead of time what it must defend against.” ALJD p. 9/11.6-10. The Union filed exceptions to this portion of the ALJ’s decision. See, e.g., Charging Party Union’s Exceptions to Administrative Law Judge Decision and Order ¶¶ 1-5. Respondent responded to the Union’s exceptions by reiterating that whether the maintenance of the rule was an independent unfair labor practice had not been fully and fairly litigated; Respondent did not address whether maintenance of the rule violated the Act (nor could it have inasmuch as it had no fair warning that it was required to do so or to present evidence supporting the reasons for the rule). See, e.g., Respondent Chino Valley Medical Center’s Answering Brief to Charging Party Union’s Exceptions to Administrative Law Judge’s Decision, pp. 5-8. The Board did not treat the Union’s exceptions to this portion of the ALJ’s decision in its decision.

Conflating the issue of maintenance of the rule in the handbook with oral statements directing employees not to discuss Union organizing activities (which oral statements were alleged as unfair labor practices in General Counsel’s complaint), the Ninth Circuit determined that Respondent had fully litigated whether maintenance of the rule violated the Act and that the Board should have addressed the Union’s contention that the Board’s order should require

Respondent to rescind the rule. Ninth Circuit Decision at 789-791. Finally, the handbook introduced into evidence during proceedings before the ALJ was modified in March 2017, prior to the Ninth Circuit’s decision. The modifications include the insertion of a sentence in the Introduction section reading “**Moreover, nothing in this Employee handbook is intended to prohibit or interfere with employees’ Section 7 rights granted under the national Labor Relations Act**” (bold emphasis original) and insertion of the sentence “This Policy should not be interpreted to prohibit employees from discussing the terms and conditions of their employment in violation of Section 7 of the National Labor Relations Act” immediately before the rule itself.”<sup>2</sup>

### **III.** **ARGUMENT**

#### **A. The Rule As Reasonably Interpreted Does Not Interfere With The Exercise Of Section 7 Rights**

The rule here is lawful, as *Boeing* confirms, because it is facially neutral and does not potentially interfere with the exercise of Section 7 rights. *Id.*, slip op. at 16 [“when a facially neutral rule, reasonably interpreted, would *not* prohibit or interfere with the exercise of NLRA rights, maintenance of the rule is lawful” (emphasis original)]. Therefore, the Board need not “evaluate or balance business justifications, and the Board’s inquiry into maintenance of the rule comes to an end.” *Id.*

Preliminarily, the rule is “facially neutral” within the meaning of the Board’s decision in *Boeing*. See, e.g., *Boeing*, slip op. at 1, fn. 4 [“[W]e use the term ‘facially neutral’ to describe policies, rules and handbook provisions that do not expressly restrict Sec. 7 activity, were not

---

<sup>2</sup> Excerpts from the modified handbook containing the quoted modifications are attached hereto as an appendix.

adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity”]. Nothing in the rule expressly or inherently restricts Section 7 activity.

Nor does the rule as reasonably interpreted potentially interfere with the exercise of Section 7 rights. Every employee understands that, in the process of operating a healthcare facility, Respondent comes into contact with and possesses sensitive and personal information related to its patients. In this context, the rule as reasonably interpreted prohibits the unauthorized disclosure of sensitive and personal information to the media. The rule’s focus is ensuring the privacy of patients and their hospital surroundings, and not to prohibit or interfere with protected activity. The rule also is reasonably interpreted to ensure that communications are not construed as misrepresenting the official positions of Respondent or its patients.

That the rule as reasonably interpreted does not interfere with Section 7 activity is further supported by the fact that the rule makes clear that it pertains to statements to the media, no discipline is threatened for violating the rule and the rule does not contain language targeting protected activity. In addition, the rule does not prevent employees from commenting generally about the terms and conditions of their employment; it simply attempts to ensure that employees are not holding themselves out as official representatives to the media if they are not so authorized. For these reasons the rule as reasonably interpreted does not potentially interfere with Section 7 rights.

**B. Any Possible Interference In Section 7 Rights Due To Maintenance Of The Rule Is Outweighed By Legitimate Justifications For The Rule**

Even if the rule can be reasonably interpreted as interfering in the exercise of Section 7 rights, maintenance of the rule is lawful because any potential impact is comparatively slight and is outweighed by Respondent’s legitimate and compelling justifications associated with the rule. *Boeing*, slip op. at 3-4. In evaluating the lawfulness of a policy, the Board will “strike the proper

balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy[.]” *Id.*, slip op. at 3. Here, the rule is fully justified by Respondent’s overriding business interests in controlling communications on its behalf regarding its official public positions, as well as its legal obligation to protect the private health information it maintains. If Section 7 rights are adversely impacted by maintenance of the rule, any impact is minimal and significantly outweighed by Respondent’s compelling and legitimate justifications for the rule. As such, Respondent’s maintenance of the rule does not constitute unlawful interference with Section 7 rights in violation of Section 8(a)(1).

In *Boeing*, the employer maintained a rule that restricted the use of camera-enabled devices on its property without a valid business need. *Id.*, slip op. at 17. The employer’s rule did not explicitly restrict any activity protected by the Act; it was not adopted in response to protected activities; and it was not applied to restrict such activities. *Id.*, slip op. at 19. The employer presented evidence that the rule was justified by the need to maintain confidentiality of the work performed at its facilities and to fulfill its federally mandated duty to prevent the disclosure of confidential information. *Id.*, slip op. at 18. The employer also presented evidence that the no-camera rule helps prevent the disclosure of the employer’s proprietary information, and it limits the risk that employees’ personally identifiable information will be released. *Id.*

In determining that maintenance of the employer’s no-camera rule is lawful, the Board in *Boeing* stated that the rule is an important part of the way the employer maintains security at its facilities and protects its business, and the rule’s adverse impact on Section 7 rights is outweighed by the employer’s compelling justifications associated with the rule. *Id.*, slip op. at 18. The *Boeing* decision also affirms principles set forth in *Flagstaff Medical Center*, 357 NLRB 659, confirming that an employer may restrict the use of recording devices because the

rule's maintenance is supported by substantial patient confidentiality interests. *Boeing*, slip op. at 19, fn. 89 ["Consistent with our analysis of Boeing's no-camera rule, we reaffirm the Board's holding in *Flagstaff Medical Center*"].

Here, as is the case for the employer in *Boeing*, Respondent's rule plays a key role in ensuring that Respondent complies with its duty to protect the information it maintains. As a healthcare facility, Respondent has a legal obligation to prevent the unauthorized disclosure of individually identifiable health information. *Flagstaff Medical Center*, 357 NLRB at 663 ["The privacy interests of hospital patients are weighty" and hospital has a legal obligation and overriding interest to protect against wrongful disclosure of "individually identifiable health information"]. As in *Boeing*, Respondent's duty to protect patient privacy is federally mandated. See, e.g., 42 U.S.C. §§ 1320d-6 [prohibiting wrongful disclosure of individually identifiable health information]; and 1320d-1 [requiring protection against unauthorized uses or disclosures of health information]. The legal obligations imposed on Respondent serve as compelling justification for the rule, which is designed in part to prevent the unauthorized disclosure of its patients' individually identifiable health information. Respondent's important interest in preventing the wrongful disclosure of such information significantly outweighs the potential risk, if any, that maintenance of the rule will impact the exercise of Section 7 rights.

Moreover, like the no-camera rule in *Boeing*, Respondent's rule is justified because it "limits the risk that employees' personally identifiable information will be released." *Boeing*, slip op. at 18 [photos of employees may invade their privacy]. As an employer, Respondent maintains personally identifiable information that is outside of the categories protected by Section 7, including not only information about patients' medical conditions and treatments but also patients' social security numbers, driver license numbers, credit card numbers, and other

background and financial information. Respondent has both legal and business interests in preventing the disclosure of this personal information, which constitutes a legitimate justification for its maintaining the rule. The rule also prevents the disclosure of Respondent's proprietary information, which the Board in *Boeing* recognized as a legitimate justification for a plant rule that could potentially impact the exercise of Section 7 rights. *Id.*, slip op. at 18 [rules protecting an employer's proprietary information "are critically important"].

Finally, employers have a legitimate interest in ensuring that employee communications are not construed as misrepresenting the employer's official public position. An employer in the healthcare industry has a heightened interest in controlling communications made on its behalf due to the highly sensitive nature of information related to healthcare. Maintenance of the rule at issue here helps to ensure that Respondent communicates with the media in a consistent, timely and professional manner about matters related to its business. For example, it is important for Respondent to communicate consistent official positions to the press about its business matters and patient care responsibilities, as unauthorized statements on its behalf may prejudice its position or expose Respondent to liability. Moreover, the rule is narrowly tailored and does not prohibit employees generally from speaking to the press.

Because the adverse impact on the exercise of Section 7 rights, if any, is outweighed by the substantial and important justifications associated with Respondent's maintenance of the rule, the maintenance of the rule does not constitute unlawful interference with protected rights, and Respondent should not be ordered to rescind the rule.

**C. Any Potential Harm Relating To Maintenance Of The Rule Is Cured By The Existing Board Order**

It is unnecessary for Respondent to rescind the rule because the Board's order already prohibits Respondent from "broadly prohibiting employees from speaking to the media,

including about the Union or about terms and conditions of employment” and includes similar language in the Notice to Employees. Board Order, slip op. at 2, 5.<sup>3</sup> Any potential harm relating to Respondent’s maintenance of the rule is already addressed by the Board’s order, which fully and adequately assures that the rule, which has since been modified as explained in Section D below, will not in any way interfere in the exercise of Section 7 rights. Because the Board’s order and Notice to Employees already cures any potential harm relating to maintenance of the rule, an additional Board order requiring that Respondent rescind the rule is unnecessary.

**D. Respondent No Longer Maintains The Rule That Is The Subject Of The Court’s Remand Order**

The Board should not order Respondent to rescind the rule because Respondent no longer maintains the rule that is the subject of the Ninth Circuit’s remand. The handbook introduced into evidence during proceedings before the ALJ was modified in March 2017, prior to the Ninth Circuit’s decision. The modifications include the insertion of a sentence in the Introduction section reading **“Moreover, nothing in this Employee handbook is intended to prohibit or interfere with employees’ Section 7 rights granted under the national Labor Relations Act”** (bold emphasis original) and insertion of the sentence “This Policy should not be interpreted to prohibit employees from discussing the terms and conditions of their employment in violation of Section 7 of the National Labor Relations Act” immediately before the rule itself.” See Appendix.<sup>4</sup> As Respondent no longer maintains the rule that is the subject of the Ninth Circuit’s remand, Respondent can no longer rescind the subject rule, even if it is ordered by the Board to do so. Additionally, because the modified rule contains disclaimers regarding employees’

---

<sup>3</sup> The Board’s order is reported at 362 NLRB No. 32 (2015).

<sup>4</sup> Excerpts from the modified handbook containing the quoted modifications are attached hereto as an appendix.

Section 7 rights, the modified rule clearly is lawful under *Boeing* as it would not, as reasonably interpreted, potentially interfere with Section 7 rights.

Even before *Boeing*, the General Counsel and members of the Board have recognized that arguably overbroad workplace policies that include appropriate disclaimers regarding employees' protected Section 7 activities do not violate Section 8(a)(1) of the Act. For example, in a June 27, 2005 Advice Memorandum, *Baltimore Sun*, Case 5-CA-32186, the Division of Advice directed Region 5 to dismiss an unfair labor practice charge regarding the employer's allegedly overbroad ethics policy. The policy at issue contained broad confidentiality rules, but it also included language disclaiming the policy's application to employees' Section 7 rights and/or activities. *Id.* at 9-10. The charging party union argued that, despite the disclaimers, the broad confidentiality rules could be construed to prohibit employees from discussing their terms and conditions of employment. Advice disagreed, stating "the disclaimers ... remove any ambiguity and make it clear that unit employees are not prohibited from engaging in Section 7 activities ... Thus, these rules are distinguishable from similar rules found unlawful in other cases, but which did not contain a disclaimer." *Id.* at 11.

Most importantly, members of the Board have stated that inclusion of appropriate disclaimer language would eliminate employers' Section 8(a)(1) liability for overbroad policies. See *Martin Luther Memorial Home*, 343 NLRB 646, 652 n. 7 (2004) ["Member Liebman observes that if the prohibited conduct is of a kind so general as to imply that protected activity may be encompassed, an employer can easily eliminate the ambiguity by adding a statement to its rule that the prohibition does not apply to conduct that is protected under the National Labor Relations Act"]; *Safeway, Inc.*, 338 NLRB 525, 527 n. 3 (2002) (Member Liebman dissenting) ["Employers who adopt [overbroad] confidentiality rules can quite easily explain to employees

that those rules do not apply to activity protected by Sec. 7”]. Clearly, both the General Counsel and the Board have recognized that Section 7 disclaimers effectively “cure” overbroad policies.

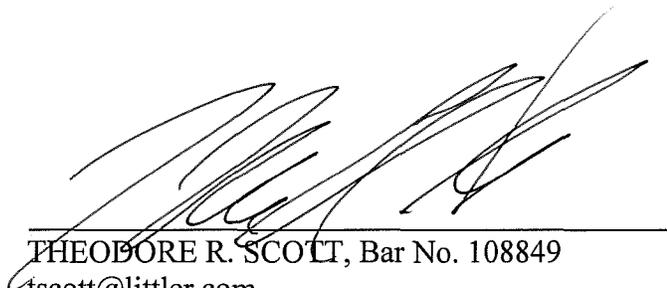
Because the modified rule eliminates any concern that the policy potentially interferes with the exercise of Section 7 rights, there is no need for a remedial order to effectuate the policies of the Act. Indeed, the Board has recognized that not every technical violation of the Act requires a remedial order. See, e.g., *Bellinger Shipyards, Inc.* 227 NLRB 620, 621 (1976) [“in view of the increasing need for expedition in the processing of cases, we have concluded that we ought not to expend the Board’s limited resources on matters which have little or no meaning in effectuating the policies of the Act. Thus in this insubstantial case, we would find that the conduct involved, although it may have been in technical contravention of the statute as interpreted by the Board, was nevertheless so insignificant and so largely remedied and rendered meaningless by the Respondent’s subsequent conduct that we will not use it as a basis for either finding a violation or issuing a remedial order”]; *American Federation of Musicians, Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 620 (1973) [“the conduct involved was so minimal and has been so substantially remedied by the Respondent’s subsequent conduct that the entire situation is one of little significance and there is no real need for a Board remedy”]. Here, as in those cases, the rule challenged by the Union, as reasonably interpreted, has a minimal impact, if any, on Section 7 rights, and any potential violation has been remedied by the subsequent revision of the rule to include a Section 7 disclaimer. Also, as explained above in Section C, any potential harm relating to Respondent’s maintenance of the rule is already addressed by the Board’s order, which fully and adequately assures that the rule will not in any way interfere in the exercise of Section 7 rights. There is therefore no need for a remedial order, and the Board

should not expend limited resources on matters which have little or no meaning in effectuating the policies of the Act.

**IV.**  
**CONCLUSION**

Respondent's rule is lawful because it is facially neutral and does not, as reasonably interpreted, potentially interfere with the exercise of Section 7 rights. In accordance with *Boeing*, Respondent's maintenance of the rule is lawful because, even if the rule adversely impacts Section 7 rights, such impacts are minimal and are outweighed by Respondent's overriding and compelling interests in preventing the unauthorized disclosure of private health information and controlling its communications to the public. Additionally, the Board's order already cures any potential harm caused by maintenance of the rule. Finally, Respondent no longer maintains the rule that is subject of the Ninth Circuit's remand, and the modified rule contains appropriate Section 7 disclaimers. For all of the above reasons, the Board should not modify its prior order to include a provision requiring Respondent to rescind the rule.

Dated: January 12, 2018



THEOBORE R. SCOTT, Bar No. 108849

tscott@littler.com

ELLIOT WILSON, Bar No. 307336

ewilson@littler.com

Littler Mendelson, P.C.

501 W. Broadway, Suite 900

San Diego, CA 92101.3577

Telephone: 619.232.0441

Facsimile: 619.232.4302

Attorneys for Respondent  
VERITAS HEALTH SERVICES, INC.  
d/b/a CHINO VALLEY MEDICAL CENTER

# APPENDIX

# Employee Handbook

 Chino Valley Medical Center

Revision 03/2017

---

The provisions contained in this handbook are applicable to all employees. However, as to union employees, to the extent the provisions in this handbook conflict with any applicable provisions of any collective bargaining agreement(s), the collective bargaining agreement(s) shall apply in such instances. **Moreover, nothing in this Employee handbook is intended to prohibit or interfere with employees' Section 7 rights granted under the National Labor Relations Act.**

Any information concerning a patient's illness, family, financial condition, or personal characteristics is strictly confidential. When a patient's history or condition is reviewed, it must be done in private only with those persons involved with the care of the patient.

This Policy should not be interpreted to prohibit employees from discussing the terms and conditions of their employment in violation of Section 7 of the National Labor Relations Act.

The Facility draws a lot of attention from the media. Only the designated spokespersons may make statements to the members of the media on behalf of the Facility, its patients, or its employees. If an employee is approached by members of the media, refer them to Administration for assistance.

Veritas Health Services, Inc. d/b/a  
Chino Valley Medical Center

Case No. 31-CA-029713, et al.  
(362 NLRB No. 32)

**PROOF OF SERVICE BY E-MAIL**

I am employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 501 W. Broadway, Suite 900, San Diego, California 92101.3577. On January 12, 2018, I served a true and correct copy of:

**RESPONDENT'S STATEMENT OF POSITION IN RESPONSE TO REMAND FROM  
NINTH CIRCUIT COURT OF APPEALS**

by e-mailing the document to the following persons at the e-mail addresses listed below:

Jessica Espinosa, Esq.  
UNAC/UHCP  
955 Overland Court, Suite 150  
San Dimas, CA 91773-1718

E-Mail Address  
jessica.espinosa@unacuhcp.org

Mori Pam Rubin, Regional Director  
National Labor Relations Board, Region 31  
11500 W. Olympic Boulevard, Suite 600  
Los Angeles, CA 90064

E-Mail Address  
nlrbregion31@nlrb.gov

Executed on January 12, 2018, at San Diego, California.



---

Rosa Dyer