

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

UNITED STATES POSTAL SERVICE

Case 28–CA–175106

and

RICHARD SANTIAGO, an Individual

Nathan A. Higley, Esq.,
for the General Counsel.

Dallas G. Kingsbury and Alexander T. MacDonald, Esqs.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case on August 22, 2017, in Las Vegas, Nevada. The case was tried following the issuance of an amended complaint and notice of hearing (amended complaint) by the Regional Director for Region 28 of the National Labor Relations Board (the Board) on June 2, 2017.¹ The amended complaint was based on a charge filed by Charging Party Richard Santiago (Santiago or Charging Party).² The General Counsel alleges that Respondent United States Postal Service (Respondent or Postal Service) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by maintaining five unlawful work rules. Respondent denies all allegations. As set forth in detail below, I find that, except with respect to one of these rules, Respondent violated the Act as alleged.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs. Post-hearing briefs, as well as supplemental post-hearing briefs

¹ Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for General Counsel’s Exhibit; “R. Exh.” for Respondent’s Exhibit; and “Jt. Exh.” for Joint Exhibit.

² Certain allegations involving Santiago’s employment with Respondent were resolved via non-Board settlement prior to hearing and are not considered here. See GC Exh. 1(g) at ¶ 5(a), (f) & (g).

addressing the impact of the Board's recent decision in *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 (2017), were filed by Respondent and the General Counsel, and each of these briefs has been carefully considered. Accordingly, based upon the entire record herein, I make the following

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FINDINGS OF FACT

A. Jurisdiction

Respondent provides postal service for the United States and operates various facilities throughout the nation. Respondent admits, and I find, that the Board has jurisdiction over the Respondent by virtue of Section 1209 of the Postal Reorganization Act (the PRA), 39 U.S.C. 15 Secs. 101, et seq.

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B. Factual Background

There is no dispute that Respondent maintained the allegedly unlawful rules.³ Four of the rules are maintained on a nationwide basis; the fifth rule applies to employees in Respondent's Nevada-Sierra District only.⁴ It is undisputed that none of the challenged rules explicitly restricts protected activities and none was promulgated in response to, or applied to restrict, protected activities.

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For ease of reference, the wording of each rule is set forth within the legal analysis section, *infra*.

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ANALYSIS

A. The Applicable Standard

Section 7 of the Act guarantees employees:

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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 of such activities...

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29 U.S.C. § 157. This guarantee is enforced through Section 8(a)(1), which makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7

³ At hearing, Respondent admitted maintaining the alleged rules. However, by its original post-hearing brief, Respondent asserts (without evidentiary support) that it has since rescinded the rules set forth at ¶ 5(c) of the amended complaint. Respondent will have an opportunity to raise this issue at the compliance stage of this proceeding.

⁴ Counsel for the General Counsel at hearing withdrew the rule alleged in ¶ 5(b)(2) of the amended complaint. (Tr. 40) In addition, following the issuance of the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017), Counsel for the General Counsel moved to withdraw paragraphs 5(b)(1), 5(b)(2), 5(b)(4), 5(b)(5), 5(b)(6), 5(b)(7), 5(c)(1), 5(c)(2)(ii), 5(c)(2)(iii), 5(c)(2)(iv), 5(d)(1)(iii), 5(d)(2) and 5(e)(i) of the amended complaint. That unopposed motion is granted.

rights. 29 U.S.C. § 158(a)(1). While a violation of any subdivision of Section 8 of the Act (for example, Section 8(a)(3)) will necessarily be found a derivative violation of Section 8(a)(1), it will also be found to be independently violated where an employer engages in “conduct which, it may reasonably said, tends to interfere with the free exercise of employee rights under the Act.”

5 *American Freightways Co.*, 124 NLRB 146, 147 (1959). Congress intended that the independent 8(a)(1) violation serve to remedy a “blanket unfair labor practice” caused by employer actions not specifically recited elsewhere in the Act, but which are “just as effective in impeding self-organization and collective bargaining.” Walter E. Oberer, *The Scianter Factor in Sections 8(a)(1) and (3) of the Labor Act of Balancing Hostile Motive Dogs and Tails*, 52 Cornell L. Rev. 491, 492–493 (1966–1967) (citing legislative history of the Wagner Act).

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No discriminatory intent is necessary to find an independent 8(a)(1) violation; as the Board has stated:

15 It is too well settled to brook dispute that the test of interference, restraint and coercion under Section 8(a)(1) of the Act does not depend on an employer’s motive nor on the successful effect of the coercion. Rather, the illegality of an employer’s conduct is

20 determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act.

Waco, Inc. 273 NLRB 746, 748 fn. 12 (1984) (citing *Daniel Construction Co.*, 264 NLRB 569 (1982)); see also *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965) (“[a] violation of § 8(a)(1) alone . . . presupposes an act which is unlawful even absent a discriminatory motive”); *International Ladies’ Garment Workers v. NLRB*, 366 U.S. 731, 739 (1961) (“We find nothing in the statutory language prescribing *scianter* as an element of the unfair labor practices [8(a)(1) and (2)] here involved”).

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30 C. *Workplace Rules as 8(a)(1) Violations and the Boeing Decision*

Over the years, the Board has been tasked with evaluating the lawfulness under Section 8(a)(1) of various workplace rules and policies. This is for good reason; work rules are not suggestions or proposals—they are standing orders—demands of employee conduct that carry an

35 implicit (and oftentimes explicit) threat of discipline for noncompliance. As such, to the extent they touch upon protected Section 7 conduct, work rules undoubtedly have the potential to chill employees in their exercise of rights guaranteed by the Act. The coercive effect of some rules is obvious; a rule will be found unlawful, for example, if it explicitly restricts Section 7 conduct. Moreover, even a facially neutral rule is unlawful where it: (a) was promulgated in response

40 Section 7-protected conduct; or (b) has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

What remains are rules such as those considered in this case, which are facially neutral and not promulgated in response to, or applied to restrict, protected activities. Such rules (which I

45 will refer to as “facially valid rules”) will nonetheless be found coercive and therefore unlawful where they, “when reasonably interpreted, would potentially interfere with Section 7 rights.” *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 (2018). Until recently, Board precedent dictated that the lawfulness of such rules should turn on whether an employee would “reasonably

construe” the rule in question to prohibit Section 7-protected conduct, taking into consideration the “surrounding circumstances” of which such an employee would be aware.⁵

5 Following my receipt of the parties’ post-hearing briefs in this matter, however, a majority of the Board rejected this standard, adopting instead a new, modified test for cases such as this. In *Boeing Company*, which specifically dealt with a ban on employee photography and video in the workplace, the Board majority stated that the *Lutheran Heritage* standard ran afoul of Supreme Court precedent “because it [did] not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions.” 365 NLRB No. 154, slip op. at 4.
 10 To correct this defect, the Board announced that it would henceforth explicitly balance such interests against the “nature and extent” of a challenged rule’s “potential impact on “NLRA rights.” *Id.*, slip op. at 7. In applying its new test, the Board stated, it intends to take into account “different industries and work settings” as well as “specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of
 15 NLRA-protected activity.” *Id.*, slip op. at 2.

Applying a balancing test to facially valid rules, the Board explained, is consistent with its duty to weigh “asserted business justifications” against “the invasion of employee rights in light of the Act and its policy.” *Id.*, slip op. at 3. As part of its balancing approach, the *Boeing* Board
 20 recognized that not all proffered business justifications are created equal, and “the mere existence of some plausible business justification” will not overcome evidence that a rule, when reasonably interpreted, prohibits or interferes with Section 7 rights. *Id.*, slip op. at 16. Likewise, the Board reasoned, not all rules that impinge upon employees’ Section 7 conduct risk doing so to the same degree. Borrowing language from its “inherently destructive” doctrine,⁶ the Board
 25 avowed that it was bound to “recognize those instances where the risk of intruding on NLRA rights is ‘comparatively slight.’” *Id.* (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)).

Notwithstanding its concern over case-specific distinctions between work settings and
 30 specific events, as well as the gradations of protected conduct and business justifications, the Board announced an initiative whereby it will declare certain rules categorically lawful and others categorically unlawful, while acknowledging a third category of rules deserving of case-by-case scrutiny. The three categories to which challenged, facially valid rules will be assigned are as follows:

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- *Category 1* will include rules that the Board designates as definitively lawful, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of
 40 NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.

⁵ See, e.g., *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 1 fn. 2 (2017); *Roomstores of Phoenix, LLC*, 357 NLRB 1690, 1690 fn. 3 (2011).

⁶ As support for its new, balancing approach to facially valid rules, the Board cited to both *Republic Aviation*, *supra*, and prior Board law recognizing “inherently destructive” conduct. See 365 NLRB No. 154, slip op. at 3, fn.13.

• *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

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• *Category 3* will include rules that the Board will designate as definitively unlawful because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

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Id., slip op. at 3–4. This characterization regime, the Board explained, will provide “far greater clarity and certainty to employees, employers and unions regarding whether and to what extent different types of rules may lawfully be maintained.” *Id.*, slip op. at 15.

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Notably, in explicating its “lawful” and “unlawful” categories, the *Boeing* Board provided illustrative examples. As an example of categorically unlawful rule, it identified “a rule prohibiting employees from discussing wages or benefits with one another.” *Id.*, slip op. at 15. Categorically lawful rules, it declared, would include the “harmonious interactions and relationships” rule previously deemed unlawful in *William Beaumont Hospital*,⁷ as well as unidentified past Board cases considering rules “requiring employees to abide by basic standards of civility.”⁸ These rules, the Board pronounced, are now deemed categorically lawful, presumably irrespective of any workplace-specific distinctions. *Id.*

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The Board next applied its new standard to Boeing’s prohibition on employees photographing or video recording on company property. Specifically, the Board found that, even though the rule might prevent employees from using photography to memorialize their Section 7 conduct, there was no allegation that the rule had “actually interfered” with Section 7 conduct. Therefore, it concluded, the rule posed only a “comparatively slight” risk to employees’ Section 7 rights. *Id.* at 19. The Board then turned to Boeing’s asserted business justifications associated with the rule, which included both internal and government mandated security protocols, proprietary and employee privacy interests, as well as industrial espionage concerns. *Id.*, slip op. at 5–6, 18. Finding these justifications “especially compelling,” the Board held that they outweighed the “comparatively slight” risk to employees’ Section 7 rights. Despite this rationale for finding Boeing’s rule lawful, the Board then declared that, even in less compelling circumstances, “no camera rules, in general, fall into Category 1.” *Id.*, slip op. at 17.

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Following *Boeing*, it remains unclear what remains of the “reasonable employee” standard recognized in *Lutheran Heritage*. By endorsing an explicit balancing approach, the *Boeing* decision does not necessarily supplant that standard. Indeed, in two separate passages, the Board indicates that, in applying the new test, the “perspective of employees” remains the proper lens with which to evaluate facially valid rules. See *id.*, slip op. at 3, 16. However, the Board did not

⁷ 363 NLRB No. 162 (2016).

⁸ While the *Boeing* case did not explicitly address the second rule found unlawful by *William Beaumont Hospital*, which prohibited “negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors,” I will assume for purposes of this decision that it intended to opine on that rule as a general “civility” rule.

directly address whether, for a business justification to outweigh employees' Section 7 rights, it must be shown that such justification is understood and appreciated by those employees.

C. *The Privacy Act*

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As noted, the parties filed supplemental briefs addressing the impact of the *Boeing* decision on this case. Respondent, by its brief, argues that application of the new balancing test dictates dismissal of the amended complaint because none of the challenged rules interferes with protected activity and each is justified by its legitimate business interests. In particular, Respondent argues that certain of the challenged rules are justified by its obligation, as a federal agency, to comply with the Privacy Act of 1974 (the Privacy Act). See 5 U.S.C. § 552a et seq. As such, a discussion of that law and Respondent's implementation of it is appropriate.

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The Privacy Act governs agencies' collection, maintenance, use, and dissemination of certain information about individuals designated as "personally identifiable information" (PII). PII may include information such as an individual's name, address, birth date, and Social Security number, depending on how it is organized and accessed within an agency's records. Respondent's Chief Privacy Officer Janine Castorina (Castorina) testified, however, just because information is not made publically available by the Postal Service does *not* mean it is necessarily subject to the Privacy Act. (Tr. 102–103)⁹

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Pursuant to the Privacy Act, federal agencies such as Respondent are required to adopt adequate safeguards to protect against the improper disclosure of PII; Respondent has therefore issued regulations implementing the law within its purview. See 39 CFR 266. These regulations are reflected in publication titled, "Handbook AS-353, Guide to Privacy, the Freedom of Information Act, and Records Management." (See R. Exh. 12) Handbook AS-353, which is posted on Respondent's public website, is rather detailed and technical and itself contains numerous references to both the regulations, as well as supplemental information and templates.

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At hearing, Castorina testified that, even with her significant experience in Privacy Act compliance, determinations as to whether specific information is covered by the Privacy Act are difficult. (Tr. 102–103) To ensure that Postal Service employees comply with the Act and that determinations of what constitutes PII are made uniformly, she explained, Respondent maintains phone and email hotlines for individuals to bring potential Privacy Act violations to Respondent's attention. She further testified that, based on her experience responding to "hotline" requests, an average employee of Respondent has no understanding of what constitutes PII. (Tr. 89–93; "They don't understand it at all.")

⁹ Indeed, because the Privacy Act's coverage is dependent on how an agency's record systems are organized, this means that it does not even cover all identifying information held by any federal agency regarding any given individual. Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. Rev. 1814, 1823–1824 (2011).

*D. Application of the Boeing Balancing Test to Individual Complaint Allegations*¹⁰

What follows is an evaluation of each of the challenged rules under the Board’s new test:

5 1. Social media rule [¶ 5(c)(2)(i)]

Respondent maintains a nationwide policy titled, “Responsible Use of Social Media,” which sets out “rules and regulations” that apply to “Postal Service employees who use social media in their official capacity to communicate with the public or Postal Service employees.” One of the
10 rules contained within this policy is alleged to violate the Act. It reads as follows:

All proprietary information and information covered by the Privacy Act are off limits. Do not post Postal Service information that has not already been made available publicly by
15 the Postal Service. Posting material or online discussion of information related to Postal Service revenue forecasts, personnel matters, future products, unannounced pricing decisions, undisclosed financial results, or similar matters is prohibited and might result in legal action against you and/or the Postal Service.
20 It is your responsibility to respect and protect the Postal Service’s confidential information by not commenting on these topics. When in doubt about what discussion topics or comments are appropriate, please contact your immediate supervisor, Corporate Communications, or the Office of the General Counsel for
25 guidance.¹¹

I find that this rule lawful under the *Boeing* balancing test. First and foremost, I note that the rule’s application is explicitly limited to a subclass of social media communications: those made by employees “in their official capacity” to communicate on behalf of Respondent. By
30 definition, this would exclude employee communications from employees’ private social media platforms (such as personal Facebook accounts). As such, I find it highly unlikely that the rule, even to the extent it references “personnel matters,” would operate to impede upon protected Section 7 conduct, or that it would be reasonably construed to do so. Put differently, I find the chance that a reasonable employee would understand this rule to bar them from discussing terms
35 and conditions of employment (i.e., “personnel issues”) via their personal social media accounts to be “comparatively slight” if not nonexistent.¹²

¹⁰ I reject Respondent’s argument that the challenged rules are lawful because they are “incorporated” into its national collective-bargaining agreements and have never been challenged by a union representing Respondent’s employees. See *Hills & Dales General Hospital*, 360 NLRB 611, 611–612 (2014) (rejecting employer’s defense that employees were themselves involved in developing unlawful rules).

¹¹ Jt. Exh. 2, p. 152.

¹² In employing the term “comparatively slight,” I do not adopt its substantive import from the “inherently destructive” doctrine, i.e., to suggest that this rule is lawful because the General Counsel failed to make an affirmative showing of improper motivation pursuant to *Great Dane*. See *International Brotherhood of Boilermakers*, 858 F.2d at 761-62 (D.C. Cir. 1988) (“there is no undistributed middle: ‘comparatively slight’ simply means ‘less than inherently destructive’”). As noted, *supra*, independent 8(a)(1) allegations require no such showing.

I further find that the rule’s stated justification—to protect proprietary, confidential and Privacy Act-covered information—is compelling, particularly in light of Respondent’s unique work setting as a federal agency subject to the Privacy Act. As noted, Respondent—as a government agency—is legally obligated to adopt adequate safeguards to protect against the improper disclosure of PII, a relatively elusive subset of information. To carry out this duty, Respondent has implemented an expansive regulatory scheme and compliance program, including employee reporting hotlines for potential violations. Demanding that employees acting *on behalf of Respondent* to avoid improper disclosures and, when in doubt, to seek guidance from management before making online statements on Respondent’s behalf, would appear to be a part and parcel of Respondent’s workplace-specific regulatory compliance efforts.

Accordingly, I conclude that the rule set forth at paragraph 5(c)(2)(i) of the amended complaint is lawful under the *Boeing* balancing test.

2. Acceptable use policy [¶ 5(d)(1)]

Counsel for the General Counsel alleges that two rules contained within Respondent’s “acceptable use” policy are unlawful. Unlike the prior social media rule, this policy applies to the work force as a whole. The policy specifically governs employee use of “information resources,” which is widely understood to refer to networks, systems, workstations, servers, routers, applications, databases, websites, online collaboration environments, and the like.¹³ The challenged rules apply to employees’ use of *any* information resources equipment, including their own personal servers and devices.¹⁴ As explained below, I find that the two challenged portions of Respondent’s acceptable use policy are unlawful under the *Boeing* balancing test.

(a) *Information resources prior consent requirement*

The first acceptable use rule challenged by the General Counsel prohibits employees from using information resources to “disclos[e] any Postal Service information that is not otherwise public without authorized management approval.”¹⁵

As a preliminary matter, it is well established that employees’ right to engage in Section 7 conduct may not be abrogated by requiring them to obtain prior authorization before engaging in such conduct.¹⁶ The question becomes, then, whether a ban on disclosing “non-public . . . Postal Service information” would violate the Act under the new balancing test. I answer this in the affirmative.

¹³ Respondent’s policy, while lacking a specific definition of the term, appears consistent with this general meaning, in that it makes multiple references to the use of such technology.

¹⁴ By contrast, certain of the policy’s other restrictions are specifically aimed at “Postal Service information resources”; others address employees’ use of “non-Postal Service information resources” (which include subcategories of “personal, contractor or supplier” resources). (Jt. Exh. 3)

¹⁵ See Jt. Exh. 3, p. 63.

¹⁶ See, e.g., *Schwan’s Home Service*, 364 NLRB No. 20, slip op. at 4 (2017) (citations omitted); see also *In re Saginaw Control and Engineering, Inc.*, 339 NLRB 541, 553 (2003) (“[t]he Board law is clear, employees do not need the Respondent’s permission, written or otherwise, to engage in protected activities”), citing *Brunswick Corp.*, 282 NLRB 794, 798 (1987). Accordingly, the Board has regularly struck down employer rules that were reasonably construed to operate as such. See, e.g., *Schwan’s Home Service*, supra, slip op. at 5; *Trump Marina Associates, LLC*, 354 NLRB 1027, 1029 fn. 3 (2009); *Crowne Plaza Hotel*, 352 NLRB 382, 386–387 (2008).

Both prior to and following the *Lutheran Heritage* decision, the Board has found that rules barring employees from sharing and discussing information about the employer not shared with the general public clearly implicate terms and conditions of employment and therefore interfere with Section 7 rights. See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 1
 5 (2015); *Cintas Corp. v. NLRB*, 482 F.3d 463, 469–470 (D.C. Cir. 2007), enfg. 344 NLRB 943 (2005); *IRIS USA, Inc.*, 336 NLRB 1013, 1014, 1016 (2001); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3, 291 (1999); see also *Schwan’s Home Service*, supra at 16 (prohibition on discussing “Schwan’s business” with nonemployees “would likely preclude most types of
 10 NLRA-protected activity”) (Miscimarra, dissenting).

Viewing this rule within the framework of the *Boeing* balancing test, I find the scales decisively tipped in favor of the right of Respondent’s employees to engage in protected conduct. I first examine the nature and extent of its adverse effect on such rights. See 365 NLRB No. 154, slip op. at 16. Respondent’s preapproval rule applies to employees’ use of
 15 email, blogging and social media on their own time and with their own resources, and demands that they obtain permission before communicating about any nonpublic aspect of their Postal Service employment—for example, providing coworkers with an email update about recent collective bargaining, about morale or about difficulties employees are having with supervisors. This incursion on Section 7 conduct is certainly more than “comparatively slight.”¹⁷

Respondent’s asserted business justification for the rule—its Privacy Act obligations—are insufficient to warrant its breadth and intrusion on Section 7 conduct. As a preliminary matter, it is far from clear that a reasonable employee would connect this rule to Respondent’s Privacy Act obligations; no part of the rule, or the acceptable use policy for that matter, makes reference to
 25 that law. Moreover, the rule—by its very terms—prohibits disclosures beyond those covered by the Privacy Act. As noted above, the Privacy Act does not cover all records held by any given government agency, and, by Respondent’s own admission, not every nonpublic Postal Service record is covered. (Tr. 89, 102) Thus, Respondent’s broad rule against disclosure of any nonpublic information simply cannot be justified by its need to protect the subset of Privacy Act-
 30 covered documents it encompasses.

Accordingly, I conclude that the rule set forth at paragraph 5(d)(1)(i) of the amended complaint is unlawful under the *Boeing* balancing test.

35 (b) *Conduct clause*

The next challenged portion of Respondent’s acceptable use policy bans employees from using any information resource (again, both on and off-duty) to “perform[] any act that may discredit, defame, libel, abuse, embarrass, tarnish, present a bad image of, or portray in false
 40 light the Postal Service, its personnel, business partners, or customers.”¹⁸ Respondent argues that this rule “mirrors” the “civility rule” considered in *William Beaumont Hospital*, and should therefore be considered a lawful “Category 1” rule under *Boeing*.¹⁹ I cannot agree. Instead, I

¹⁷ Once again, despite the Board’s frequent reference to *Great Dane*, I do not understand the *Boeing* decision to imply that, in order for a facially valid rule to be found unlawful, it must be deemed “inherently destructive.”

¹⁸ Jt. Exh. 3, p. 63.

¹⁹ As noted, it is unclear whether *Boeing* intended to overrule *William Beaumont* insofar as this rule is concerned; my analysis assumes arguendo that it did so intend.

find that Respondent’s rule exceeds the parameters of a valid civility rule of the type referenced in by the Board in explicating its new standard.

5 Critically, unlike the *William Beaumont* rule relied on by Respondent, the very wording of its rule suggests that its primary purpose is not to engender workplace civility among workers but rather to protect *Respondent’s* reputation and image. The rule acts to shield Respondent from criticism by its employees; as such, it necessarily prohibits Section 7 conduct, such as engaging in online criticism of the Postal Service as an employer. See *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (unlawful to ban “derogatory attacks” on employer representatives; 10 such prohibition necessarily encompasses protected conduct “such as an assertion that an employer overworks or underpays its employees”), *enfd.* in relevant part 916 F.2d 932, 940 (4th Cir. 1990). Violations of Respondent’s purported civility rule would include an employee using social media to politely yet publically discredit and embarrass Respondent by accusing it of committing unfair labor practices. Indeed, no matter how “civilly” an employee used social 15 media to complain about Respondent as an employer, she would reasonably understand herself to be in violation of the rule. Because the rule so squarely disallows courteous online protected conduct, I find that it cannot be rationalized as an effort to promote workplace civility.

20 Accordingly, I conclude that the rule set forth at paragraph 5(d)(1)(ii) of the amended complaint is unlawful under the *Boeing* balancing test.

3. Rules requiring participation in investigations [¶ 5(b)(3) and ¶ 5(e)(2)]

25 The General Counsel alleges as unlawful two rules compelling employees to cooperate in its investigations. The first is a nationwide rule that states that employees “must cooperate in any postal investigation, including Office of Inspector General investigations.” The second rule is maintained with respect to Respondent’s Nevada-Sierra District employees. It proscribes an employee’s “[f]ailure to cooperate in, or the impeding of, any Postal inspection or investigation.” As set forth below, I find that these rules are unlawful under the *Boeing* balancing test. 30

The lawfulness of mandatory participation rules such as those challenged here turns on their impact on the specific employee rights recognized by the Board’s decision in *Johnnie’s Poultry*, 146 NLRB 770 (1964), *enf. denied* 344 F.2d 617 (8th Cir. 1965). That decision permits an employer investigating alleged unfair labor practices to question its employees regarding the same without being found to have conducted an unlawfully interrogation. *Id.* Recognizing, 35 however, that such questioning has a “pronounced effect” on employees’ Section 7 rights, the Board also required that, for the employer’s questioning to be deemed lawful, it must give assurances to the questioned employees that their participation is voluntary and that they will not be subject to reprisals. *Bill Scott Oldsmobile*, 282 NLRB 1073, 1074 (1987). Failure to provide the necessary assurances violates the Act, regardless of the employer’s intent. *Kyle & Stephen, Inc.*, 259 NLRB 731 (1981) (failure to give *Johnnie’s Poultry* assurances unlawful regardless of employer’s intent to coerce). 40

Prior to *Lutheran Heritage*, the Board specifically found unlawful a rule omitting *Johnnie's Poultry* assurances but nonetheless compelling employee participation in employer investigations. *Beverly Health & Rehabilitation Services*, 332 NLRB 347 (2000), enfd. 297 F.3d 468 (6th Cir. 2002). Such a rule, the Board explained, inhibits protected, concerted activity by effectively endorsing a *Johnnie's Poultry* violation, i.e., by allowing an employer "to coerce employees, under threat of discipline, to cooperate with an employer investigation of unfair labor practice charges." Id. at 349. To use *Boeing's* parlance, rules such as Respondents' that explicitly subject employees to conduct that the Board has recognized as unlawful for over 50 years cannot be considered "comparatively slight" in their impact on Section 7 rights.

Pursuant to the Board's new standard, however, I must nonetheless find Respondent's compulsory cooperation rules lawful if it can establish a substantial, work-related justification for these rules that outweighs their adverse impact on NLRA rights. In this regard, Respondent claims that its rules are necessary to implement its duty, pursuant to the Inspector General Act²⁰ and a "Management Directive" of the Equal Employment Opportunity Commission,²¹ "to ensure that its employees cooperate in certain official investigations."

I disagree. First, the rules are not limited to investigations mandated by the regulations and administrative guidance cited by Respondent, but apply to "any" investigation undertaken by Respondent. "Any" means all investigations, including those concerning unfair labor practices, to which *Johnnie's Poultry* rights would attach. Moreover, Respondent has failed to demonstrate that providing the assurances mandated by Board law would conflict or interfere with any legal or regulatory duty imposed on Respondent to ensure complete investigations; it follows that omitting those assurances serves no legitimate and substantial business purpose.

Accordingly, I conclude that the rules set forth at paragraphs 5(d)(1)(ii) and 5(b)(4) of the amended complaint respectively, are unlawful under the *Boeing* balancing test.

CONCLUSIONS OF LAW

1. Respondent provides postal service for the United States and operates various facilities throughout the United States. The Board has jurisdiction over Respondent and this matter by virtue of Section 1209 of the Postal Reorganization Act.

2. Respondent has violated Section 8(a)(1) of the Act by maintaining the following rules in its Handbook AS-805, 5-5 Prohibited Uses of Information Resources, prohibiting employees when using information resources from:

(a) "[d]isclosing any Postal Service information that is not otherwise public without authorized management approval."

(b) "[p]erforming any act that may discredit, defame, libel, abuse, embarrass, tarnish, present a bad image of, or portray in false light the Postal Service, its personnel, business partners, or customers."

²⁰ 5 U.S.C. App. 3 § 6.

²¹ EEOC Mgmt. Dir. 110, Ch. 6, sec.III (A), (C).

3. Respondent has violated Section 8(a)(1) of the Act by maintaining a rule in its Employee and Labor Relations Manual (ELM) at section 665.3, requiring employees to “cooperate in any postal investigation, including Office of Inspector General investigations.”

4. Respondent has violated Section 8(a)(1) of the Act by maintaining a rule in its Nevada-Sierra District Employee conduct Policy Letter—Re-Issue, subjecting employees to discipline, including removal, for “[f]ailure to cooperate in, or the impeding of, any Postal inspection or investigation.”

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²²

ORDER

Respondent, United States Postal Service, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the following rules in its Handbook AS-805, 5-5 Prohibited Uses of Information Resources:

Generally prohibited activities when using information resources include, but are not limited to, the following:

- (i) Disclosing any Postal Service information that is not otherwise public without authorized management approval.
- (ii) Performing any act that may discredit, defame, libel, abuse, embarrass, tarnish, present a bad image of, or portray in false light the Postal Service, its personnel, business partners, or customers.

(b) Maintaining the following rule in its Employee and Labor Relations Manual (ELM):

ELM Section 665.3 – Cooperation in Investigations

Employees must cooperate in any postal investigation, including Office of Inspector General investigations.

(c) Maintaining the following rule in its Nevada-Sierra District Employee conduct Policy Letter—Re-Issue:

Failure to cooperate in, or the impeding of, any Postal inspection or investigation.

²² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board’s Order, rescind the following rules in its Handbook AS-805, 5-5 Prohibited Uses of Information Resources:

Generally prohibited activities when using information resources include, but are not limited to, the following:

(i) Disclosing any Postal Service information that is not otherwise public without authorized management approval.

(ii) Performing any act that may discredit, defame, libel, abuse, embarrass, tarnish, present a bad image of, or portray in false light the Postal Service, its personnel, business partners, or customers.

(b) Within 14 days from the date of the Board’s Order, rescind the following rule in its Employee and Labor Relations Manual (ELM):

ELM Section 665.3 – Cooperation in Investigations

Employees must cooperate in any postal investigation, including Office of Inspector General investigations.

(c) Within 14 days from the date of the Board’s Order, rescind the following rule in its Nevada-Sierra District Employee conduct Policy Letter – Re-Issue subjecting employees to discipline, including removal, for “[f]ailure to cooperate in, or the impeding of, any Postal inspection or investigation,” and remove from its bulletin boards throughout its Nevada-Sierra District postings that memorialize either of those rules.

(d) Within 14 days after service by the Region, post at its facilities nationwide copies of the attached notice marked “Appendix A” and copies of the attached notice marked “Appendix B” at its facilities within its Nevada-Sierra district.²³ Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent’s authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, postal-vision, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has closed certain facilities involved in these proceedings, Respondent

²³ If this Order is enforced by a judgment of a United States court of appeals, the words in each notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 28, 2015.

- 5 (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.
- 10 3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
4. Respondent has not violated the Act except as set forth above.

Dated: Washington, D.C. March 9, 2018



Mara-Louise Anzalone
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefits and protection

Choose not to engage in any of these protected activities

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain the following rules in Handbook AS-805, 5-5 Prohibited Uses of Information Resources:

- a rule prohibiting you from disclosing nonpublic Postal Service information without authorized management approval.
- a rule prohibiting you from “performing any act that may discredit defame, libel, abuse, embarrass, tarnish, present a bad image of, or portray in false light the Postal Service, its personnel, business partners, or customers.”

WE WILL NOT maintain a rule in the Employee and Labor Relations Manual (ELM), requiring your cooperation in any Postal Service investigation, including Office of Inspector General investigations, without giving you assurances that your participation in investigations of unfair labor practices is voluntary and that you will not face retaliation for refusing to participate.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the following rules in Handbook AS-805, 5-5 Prohibited Uses of Information Resources:

- the rule prohibiting you from disclosing nonpublic Postal Service information without authorized management approval.
- the rule prohibiting you from “performing any act that may discredit defame, libel, abuse, embarrass, tarnish, present a bad image of, or portray in false light the Postal Service, its personnel, business partners, or customers.”

WE WILL rescind the rule stated at section 665.3 of the Employee and Labor Relations Manual (ELM), requiring your cooperation in any Postal Service investigation, including Office of Inspector General investigations, without giving you assurances that your participation in investigations of unfair labor practices is voluntary and that you will not face retaliation for refusing to participate.

UNITED STATES POSTAL SERVICE

(Employer)

Dated _____ By _____
(Representative) *(Title)*

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/28-CA-175106 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, D.C. 20570, or by calling (202) 273-1940



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-416-4755.

APPENDIX B

**NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefits and protection

Choose not to engage in any of these protected activities

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain a rule in our Nevada-Sierra District Employee Conduct Policy Letter – Re-Issue, that states that you may be subject to discipline, including removal, for “[f]ailure to cooperate in...any Postal inspection or investigation” without giving you assurances that your participation in investigations of unfair labor practices is voluntary and that you will not face retaliation for refusing to participate.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the rule stated in paragraph 24 of our Nevada-Sierra District Employee Conduct Policy Letter – Re-Issue that states that you may be subject to discipline, including removal, for “[f]ailure to cooperate in...any Postal inspection or investigation” and remove from its bulletin boards throughout its Nevada-Sierra District postings that memorialize this rule.

UNITED STATES POSTAL SERVICE

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
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