

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

NOVELIS CORPORATION

and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC

Cases: 03-CA-121293
03-CA-121579
03-CA-122766
03-CA-123346
03-CA-123526
03-CA-126738
03-CA-127024

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UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC

Case: 03-RC-120447

**POSITION STATEMENT ON REMAND OF CHARGING PARTY UNITED
STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS,
INTERNATIONAL UNION, AFL-CIO**

Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing,
Energy, Allied Industrial and Service Workers, International Union, AFL-CIO
("the Union") files this position statement in response to the National Labor
Relations Board's ("NLRB" or "the Board") June 22, 2018 invitation. This case
was remanded by the U.S. Court of Appeals for the Second Circuit to permit the
Board to "reconsider[] on remand" the portion of the Board's decision
"concern[ing] Novelis' social media policy" and solicitation rule in light of the

Board’s intervening decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), as well as “for further proceedings consistent with [the Court’s] opinion.” *Novelis Corp. v. NLRB*, 885 F.3d 100, 111 (2d Cir. 2018). *See also id.* at 105 n.6 (“Because the case is being remanded to the Board in any event, the Board may assess the applicability, if any, of the change in the test to the affected charges.”).

The Union joins in full the arguments set forth in Counsel for the General Counsel’s Statement to the Board, including with regard to the requests that: (1) the Board reissue the bargaining order or, at a minimum, remand that issue to an administrative law judge to receive evidence of Novelis’ post-election conduct bearing on the appropriateness of a bargaining order; and (2) the Board order special remedies in the event it deems reissuance of a bargaining order inappropriate. The Union files this position statement to provide further argument regarding Novelis’ two work rules.

As we explain below, Novelis’ social media policy is unlawful under *Boeing* as a “Category 3 rule,” *i.e.*, a “rule[] that the Board will designate as *unlawful* to maintain because [it] would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.” 365 NLRB No. 154, slip op. 4 (emphasis in original). Novelis’ solicitation rule, on the other hand, is unlawful under a straightforward application of *Republic Aviation v. NLRB*, 324 U.S. 793, 797-98 (1945), and its progeny, precedent that is entirely unaffected by *Boeing*.

The Board should thus reaffirm that Novelis' social media policy and solicitation rule violate the Act. The Board should, however, amend its prior order to make clear that the company's solicitation rule is unlawful with regard to all forms of Section 7-protected solicitation, not just solicitation by email.

BACKGROUND

Two of Novelis' rules are at issue on remand. The first is Novelis' "Social Media Standard," which states, in relevant part:

"The following set of principles refers to **personal or unofficial online activities** if referring to Novelis.

...

2. **You are responsible for your words and actions.** Anything that an employee posts online that potentially can tarnish the Company's image ultimately will be the employee's responsibility. If an employee chooses to participate in the online social media space, he/she must do so properly, exercising sound judgment and common sense.

...

5. . . . Remember NEVER to disclose non-public information about the Company (including confidential information), and be aware that taking public positions online that are counter to the Company's interests might cause conflict and may be subject to disciplinary action."

GC Ex. 26 (bold in original). Referring to the Social Media Standard as a whole, the policy states: "Any deviation from these commitments may be subject to disciplinary action, up to and including termination." *Ibid.*

The second rule, Novelis' "Solicitation Standard," states, in relevant part:

"Solicitation can interfere with normal operations, be detrimental to efficiency, cause unnecessary annoyance, and pose a threat to security. Novelis prohibits solicitation and distribution in working areas of its premises and during working time (including Company email or any other Company distribution lists).

...

Employees are prohibited from soliciting funds or signatures, conducting membership drives, posting, distributing literature or gifts, offering to sell or to purchase merchandise or services (except as approved for Novelis business purposes) or engaging in any other solicitation, distribution or similar activity on Company premises or via Company resources during working times and in working areas.”

GC Ex. 2.

The Board decided that Novelis violated the Act by maintaining an “overly broad unlawful social media policy” and “an overly broad work rule” against solicitation, including solicitation by email. *Novelis Corp.*, 365 NLRB No. 101, slip op. 2 (Aug. 26, 2016). The Board ordered Novelis to cease and desist “[m]aintaining and giving effect to its overly broad unlawful social media policy” and, with regard to the Solicitation Standard, “[m]aintaining an overly broad work rule that unlawfully interferes with employees’ use of the Respondent’s email system for Section 7 purposes.” *Id.*, slip op. 8.

The Board analyzed the social media rule pursuant to the approach set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Subsequent to its decision in this case, the Board issued *Boeing*, which overruled *Lutheran Heritage*’s “‘reasonably construe’ standard” for analyzing certain workplace rules. *Boeing*, 365 NLRB No. 154, slip op. 1 (quoting *Lutheran Heritage*, 343 NLRB at 646-47). Upon the Board’s request, the Second Circuit remanded the portions of the Board’s decision concerning Novelis’ social media policy and solicitation rule back to the Board for further consideration in light of *Boeing*.

ARGUMENT

As the *Boeing* decision makes clear, many rules that were unlawful under *Lutheran Heritage* remain so under *Boeing*. That is the case with regard to the two rules at issue here. The Board should thus reaffirm its decision finding Novelis' social media policy and solicitation rule unlawful.

A. The Social Media Standard is unlawful under *Boeing*

The Board previously determined that Novelis' Social Media Standard is unlawfully overbroad because it "threaten[s] employees with discipline for posting messages that may 'potentially' or 'might' conflict with the Company's position," such that "an employee could reasonably construe this language to prohibit, e.g., protests of unfair labor practices, activity which may 'potentially tarnish' or 'cause conflict' with the Company's image, but which is yet protected by Section 7." *Novelis*, 364 NLRB No. 101, slip op. 40. Although the Board analyzed this rule through the lens of *Lutheran Heritage*, the same result pertains when the rule is analyzed under *Boeing*. The Board should thus reaffirm its decision finding Novelis' Social Media Standard unlawful.

In the parlance of *Boeing*, Novelis's social media policy falls within "Category 3," "rules that the Board will designate as *unlawful* to maintain 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." *Boeing*, 364 NLRB No. 154, slip op. 4 (emphasis in original). As the ALJ found, the social media policy prohibits core NLRA-protected conduct – such as "protests of unfair labor practices," *Novelis*, 364 NLRB No. 101, slip op. 40 – since such protests predictably will be viewed by the

employer as “tarnish[ing] the Company’s image” and very likely will involve employees “taking public positions online that are counter to the Company’s interests [and] might cause conflict.” GC Ex. 26. Unlike “rules requiring employees to abide by basic standards of civility,” which are permissible under *Boeing*, the restrictions contained in the Social Media Standard directly “prohibit or limit NLRA-protected conduct” such that “the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.” *Boeing*, 364 NLRB No. 154, slip op. 3-4 (contrasting lawful rules falling within “Category 1” with unlawful rules falling within “Category 3”).

Former Chairman Miscimarra reached the same conclusion with regard to a very similar employer rule prohibiting “[b]ehavior which violates common decency or morality or publicly embarrasses the Hotel or Company.” *Sheraton Anchorage*, 362 NLRB No. 123, slip op. 5 (June 18, 2015) (Miscimarra, Member, concurring in part and dissenting in part) (quoting employer rule). Chairman Miscimarra analyzed that rule as follows:

“On its face, that portion of the rule subjects an employee to discharge without warning based on *any* type of behavior that is ‘publicly embarrassing’ to the Respondent. Of course, a central aspect of the Act is the right of employees to engage in ‘concerted’ actions that publicize particular labor disputes and, potentially, cause public embarrassment to the employer. For example, handbilling to inform customers that an employer pays substandard wages and benefits is quintessential Section 7 activity. Employees engaged in such activity intend to publicly embarrass an employer as a means to gain an advantage in negotiations or to otherwise secure employer concessions. Thus, the Respondent’s prohibition of any activities that cause public embarrassment goes directly to a central aspect of the Act’s protection. For these reasons, I join my colleagues in finding that this aspect of the rule is facially unlawful.”

Id. at slip op. 5-6 (Miscimarra, Member, concurring in part and dissenting in part) (emphasis in original).

The same is true here: Novelis’ prohibition on “tarnish[ing] the Company’s image” and “taking public positions online that are counter to the Company’s interests [and] might cause conflict,” GC Ex. 26 – like a rule against “publicly embarrass[ing] the . . . Company” – “goes directly to a central aspect of the Act’s protection” and are thus “facially unlawful.” *Sheraton Anchorage*, 362 NLRB No. 123, slip op. 5-6 (Miscimarra, Member, concurring in part and dissenting in part). Although former Chairman Miscimarra’s opinion pre-dates *Boeing*, the basic view he expresses – that a rule that “prohibit[s] . . . activities that . . . go[] directly to a central aspect of the Act’s protection” is “facially unlawful,” *ibid.* – is indistinguishable from *Boeing*’s description of an unlawful Category 3 rule – “the type of rule [that] predictably has an adverse impact on Section 7 rights that outweighs any justifications,” *Boeing*, 365 NLRB No. 154, slip op. 4.¹ The Board should thus reaffirm that Novelis’ Social Media Standard is unlawful under *Boeing*.

B. The Solicitation Standard is unlawful under *Boeing*

The Board correctly determined that Novelis’ Solicitation Standard, which applies to email as well as traditional forms of solicitation, is unlawfully broad because it

¹ An NLRB ALJ recently concluded that “the ruling in *Sheraton Anchorage*, which was not overruled or even cited in *Boeing*, strongly suggests that [a social media] rule [prohibiting employees ‘from posting information regarding the Company . . . that could detrimentally affect the Company’s business’] would fall under ‘category 3’ and would therefore be presumptively unlawful.” *Apex Linen Service, Inc.*, JD(SF)-15-18, at 4, 33 (ALJ Dec., June 6, 2018).

prohibits employees from engaging in Section 7-protected solicitation during non-work time in working areas, contrary to *Republic Aviation* and its progeny. Because *Boeing* makes clear that it does not affect precedent concerning employees' core Section 7 right to engage in solicitation at the workplace, the Board should reaffirm its decision finding Novelis' Solicitation Standard unlawful. The Board should, however, amend its prior order to clarify that Novelis' rule is unlawful because it interferes with all manner of Section 7-protected solicitation, not just solicitation that takes place over email.

On its face, Novelis' Solicitation Standard prohibits employees from "engaging in any [] solicitation . . . during working times *and in working areas*." GC Ex. 2 (emphasis added).² As counsel for the General Counsel explained in the answering brief to Novelis' exceptions, the company's rule is overbroad because it "prohibits solicitations in work areas during non-work time." GC Answering Br. 58 (underline in original) (citing *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962)). Board precedent is extremely clear that "employees have the statutory right to engage in solicitations for a union in

² The solicitation policy clearly prohibits "solicitation in working areas" during nonworking time. This is clear from the terms of the policy, which "prohibits solicitation and distribution in working areas of its premises *and* during working time" and states that employees are "prohibited from . . . engaging in any . . . solicitation, distribution or similar activity on Company premises or via Company resources during working times *and* in working areas." GC Ex. 2 (emphasis added). If the prohibition on solicitation applied only during worktime, the word 'and' would have been omitted and the policy would have "prohibit[ed] solicitation and distribution in working areas of its premises . . . during working time." But phrased in that way, the rule would permit *distribution* in working areas during nonworking time. Novelis has made clear that this is *not* what its rule means. *See, e.g.*, Novelis Brief in Support of Exceptions at 46 n.49 (stating that "[t]he ALJ erred in finding that any of these areas are not work areas in which Novelis could lawfully regulate distribution").

work areas and non-work areas during their non-working time.” *Ibid.* (underline in original). See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 n.21 (1978) (“The Board . . . has distinguished between distributions of literature and oral solicitation, holding that the latter but not the former may take place in working areas during nonworking time.” (citing *Stoddard-Quirk*, 138 NLRB 615)).

Nothing in *Boeing* calls into question this well-established rule. To the contrary, *Boeing* cites the Board’s traditional solicitation and distribution rules with approval as examples of the Board “balanc[ing] Section 7 rights against legitimate employer interests.” *Boeing*, 365 NLRB No. 154, slip op. 8 & n.33 (citing *Stoddard-Quirk* and *Peyton Packing*, 49 NLRB 828, 843 (1943), among other precedents). See also *id.* at slip op. 7 & n.30 (discussing *Republic Aviation* to same effect). As the current General Counsel has correctly explained: “[T]he Board in *Boeing* did not alter well-established standards regarding certain kinds of rules where the Board has already struck a balance between employee rights and employer business interests. For instance, *Boeing* did not change the balancing test involved in assessing the legality of no-distribution, no-solicitation, or no-access rules.” GC Memo 18-04, *Guidance on Handbook Rules Post-Boeing* 1-2 (June 6, 2018). The Board should thus reaffirm its decision that Novelis’ Solicitation Standard violates the Act.

The Board’s prior order regarding the Solicitation Standard, however, was inexplicably limited to addressing the application of that rule to employee use of email. Rather than requiring Novelis to “[c]ease and desist from . . . [m]aintaining an overly broad work rule that unlawfully interferes with employee’ use of the Respondent’s email

system for Section 7 purposes[,]” *Novelis*, 364 NLRB No. 101, slip op. 8, an amended order should provide the full traditional remedy for an unlawful solicitation rule – requiring the company to cease and desist from “in any manner prohibiting its employees, during nonworking time, from otherwise soliciting their fellow employees” for Section 7 purposes. *Stoddard-Quirk*, 138 NLRB at 624.

CONCLUSION

The Board should reaffirm its conclusions that Novelis’ Social Media Standard and Solicitation Standard violate the Act, while amending its prior order with regard to the solicitation rule to make clear that the company must cease and desist from enforcing that rule as it applies to all forms of protected solicitation, not just email.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2018, I e-mailed a copy of the General Counsel’s Statement of Position to the Board in Novelis Corp., 03-CA-121296, et al, on the individuals identified below and filed it on July 20, 2018 with the NLRB’s e-filing system.

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